SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ALUMINUM COMPANY OF AMERICA
and
REYNOLDS METALS COMPANY, *Appellants*,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal From Judgment of Three-Judge Court for Eastern District of Arkansas

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRIOR OPINIONS

This appeal is from a judgment of a three-judge statutory court in the United States District Court for the Eastern District of Arkansas—Pine Bluff Division, entered on December 16, 1966 in Docket No. PB-65-C-52 affirming a decision of the Interstate Commerce Commission. A copy of the judgment and the memorandum opinion (— F. Supp. —) are attached hereto in the appendix at pp. 1a-15a.

The decision of the Interstate Commerce Commission is reported at 326 ICC 19, entitled *Arkansas Intrastate Freight Rates and Charges* Docket #34373 and is

attached in the appendix at pp. 16a-74a. The decision of the Commission required increases in the Arkansas intrastate freight rates corresponding to increases in interstate freight rates permitted by the Commission in *Ex Parte* 212 and *Ex Parte* 223.[1]

The increases in rates sought had been denied in three separate proceedings before the Arkansas Commerce Commission in Docket Numbers R-1237, R-1495 and R-1506. Copies of the Arkansas Commission's orders (not reported) are attached at pages 75a-86a of the Appendix.

GROUNDS FOR JURISDICTION

This appeal involves a proceeding to set aside a decision of the Interstate Commerce Commission. The District Court sustained the Interstate Commerce Commission's decision, including that part of the decision which required increase of the Arkansas fluxing stone rate. Although other commodities were involved in the proceeding before the Commission and the District Court, those commodities are not involved in this appeal. Appellants contend that the Interstate Commerce Commission wrongfully exceeded its authority in requiring an increase on fluxing stone and that the District Court erred in sustaining that part of the Commission's decision.

The proceeding before the Commission originated on petition of the railroads operating in Arkansas asking the federal Commission to prescribe higher state rates pursuant to authority conferred by Sections 13(3)

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[1] *Ex Parte 212, Increased Freight Rates,* 1958, 302 I.C.C. 665; 304 I.C.C. 289; *Ex Parte 223, Increased Freight Rates,* 1960, 311 I.C.C. 373.

and 13(4) of the Interstate Commerce Act. (49 USCA 13(3) and 13(4)). The state Commission had rejected the higher rates three times. After hearing under modified procedure,[2] the federal Commission found, (Commissioner Freas dissenting), that the Arkansas rate level caused an undue burden on, and unjust discrimination against interstate commerce.

Upon complaint to a statutory three judge Court (49 U.S.C.A. 17(9); 28 U.S.C.A. 1336, 2284, 2321-2325) the Commission was sustained and the complaints of appellants were dismissed. The judgment of the District Court was entered on December 16, 1966. Timely notice of appeal was filed on January 16, 1967 in the United States District Court for the Eastern District of Arkansas, Pine Bluff Division. Direct appeal is authorized by Title 28, sections 1253 and 2101. This Court has sustained such direct appeal in many cases. See *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 567-68; *United States* v. *Hancock Truck Lines*, 324 U.S. 774, 776-77; *Public Service Commission of Utah* v. *United States*, 356 U.S. 421 (1958).

QUESTIONS PRESENTED ON APPEAL

This appeal presents another clash between state and federal agencies in the regulation of intrastate commerce. The Arkansas Commerce Commission refused to allow any of the increases sought. The Interstate Commerce Commission ruled that the general level of rates applicable on intrastate commerce in Arkansas

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[2] Modified procedure provides for direct evidence of the parties to be submitted in affidavit form without oral hearing. Cross examination is allowed only on specific request at an oral hearing. In this case the cross examination lasted only one day so there is only one volume of transcript.

was so low as to constitute a burden on interstate commerce. But the Commission did not stop with a decision on the general level of all Arkansas rates. It went further and held that the rate on fluxing stone[3] used in the aluminum industry also was so low as to constitute a burden against interstate commerce. This is the question presented here—whether the Interstate Commerce Commission exceeded its authority in holding the Arkansas intrastate rate on fluxing stone to be a burden on interstate commerce, when such rate is higher than an interstate rate, approved by the Interstate Commerce Commission, also applicable on fluxing stone in the same general territory? The District Court sustained the Commission's authority to order this rate increased and in this respect the Court was in error.

STATEMENT OF THE CASE

The issue presented on this appeal differs from the normal question presented in appeals involving Section 13(4) because the general level of state rates is not involved. The question turns on the authority of the Interstate Commerce Commission to require a specific state rate increased *above* a rate level approved by it for application in interstate commerce in the same territory and on the same commodity—crushed limestone for fluxing purposes.

The regulation of rates on intrastate commerce is within the primary jurisdiction of the state regulatory bodies, in this case the Arkansas Commerce Commission. The Interstate Commerce Commission is only

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[3] This was a maximum rate prescribed by the Arkansas Commerce Commission in Docket No. R-976 (Exhibit H-1) on May 3, 1956. (R. 990-97) The rate is applicable only on shipments in excess of 1500 tons in one consignment and applies to limestone used for fluxing purposes in the production of aluminum.

authorized to assert jurisdiction over state rates when there is an effect on interstate commerce in an area which has been preempted by the Interstate Commerce Commission. Specifically section 13(4) requires at least one of the following two factual situations to be shown:

(1) That the state rates involved cause discrimination against shippers or localities engaged in interstate commerce; or

(2) The level of the state rates is so low as to cause a burden on, or discrimination against, interstate commerce.

The Interstate Commerce Commission based its holding solely on the second ground and found that the rates within Arkansas caused an undue burden on interstate commerce. With respect to fluxing stone, the commodity involved in this appeal, the Commission found:

(1) The level of rates on crushed limestone used in the aluminum industry for fluxing purposes in Arkansas is higher than the rates on crushed limestone used in the alkali industry for fluxing purposes in interstate commerce in the same territory (p. 26a);

(2) There can be no discrimination against interstate commerce by a state rate which is higher than an interstate rate with which it can appropriately be compared (27a).

Nevertheless, the Commissions ultimately held that the Arkansas fluxing stone rate must be increased because it was a burden on interstate commerce. (p. 41a)

The Commission sought to justify its conclusion by stating that the lower interstate rate "is not an appropriate measure of the maximum level of Arkansas intrastate rates on fluxing stone." (p. 27a) Appellant contends that the Interstate Commerce Commission has no jurisdiction to fix the maximum rate level on any commodity within the state of Arkansas. This is the exclusive province of the Arkansas Commission. The effect of the Commission's decision is to establish a *minimum rate* below which the railroads cannot go even if they wanted to. Thus, the ultimate issue is whether the Interstate Commerce Commission can assert jurisdiction over the Arkansas rates on fluxing stone when the uncontroverted evidence shows that the Interstate Commerce Commission has approved a rate on fluxing stone, applicable on interstate commerce, moving through the state of Arkansas, which is at a lower level than the fluxing stone rate applicable within Arkansas.[4]

The District Court considered the issue of the fluxing stone rate at some length (App. pp. 11a-14a). It concluded that the Commission's determination to disregard the lower interstate rate was supported by substantial evidence and was a matter "peculiarly within the competence of the Commission" (App. p. 14a). In this respect the Court misconceived the issue. The authority of the Interstate Commerce Commission over intrastate rates is limited. The Commission said it disre-

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[4] The interstate rate, which the Commission conceded was lower, applied to crushed limestone in the alkali industry. The witness for the railroad carrying this stone admitted it was fluxing stone (R. 893; Tr. 22) and the Commission found, in an adversarial proceeding, that the rate was compensatory. *Limestone, Prairie du Rocher, Ill. to Baton Rouge, La.*, 313 I.C.C. 71, 86.

garded the lower interstate rate because it did not represent an appropriate measure of the *maximum level* of the Arkansas rate. This is not within the peculiar competence of the Interstate Commerce Commission. It is within the exclusive jurisdiction of the Arkansas Commission.

IMPORTANCE OF QUESTION PRESENTED

Appeals to this Court involving Section 13(4) of the Interstate Commerce Act are generally concerned with the level of intrastate rates as a whole and the adequacy of revenues produced by such rates. In the usual case, the Commission many times exempts certain specific commodities from its order on the grounds that an increase is not required under Section 13(4). In this appeal, however, the Commission has specifically required an increase in the rate on fluxing stone and its basis appears to be founded on disagreement with the Arkansas Commission over the proper maximum rate. The authority to judge that point where a state rate reaches a maximum reasonable level has always been within the exclusive jurisdiction of the state regulatory agency. The Interstate Commerce Commission has similar exclusive authority over rates which apply in interstate commerce. The determination of a maximum rate depends on many factors; as, for example, the nature of the commodity, its value, the value of the service, the size and regularity of the movement, diversion factors, the effect of the commodity movement on the local economy, its production of additional traffic, cost of service, etc. Insofar as the movement originates, terminates and travels within the confines of one state, these factors are best determined by the state agency.

However, this Court and the Congress recognized long ago that a point may be reached where local prejudice or preference might be so persuasive that rates set by the state agency would discriminate against interstate shippers or be so low that, to provide the service, would be a drain on the carriers' revenues and thus be a burden on interstate commerce.[5]

Here, the Commission has gone beyond the power conferred on it by Section 13 of the Interstate Commerce Act. The Interstate Commerce Commission is asserting that a maximum rate order of the Arkansas Commerce Commission is so low that it constitutes a burden on interstate commerce. Yet it acknowledges that it approved an even lower rate applicable for interstate commerce in the same territory and found that lower rate compensatory (313 I.C.C. 86). The parties agree that the commodities involved in the two compared movements are the same—fluxing limestone. The Commission contends, because the tariff descriptions are dissimilar and because no evidence was introduced to show that the two crushed limestones for fluxing purposes were interchangeable, that the lower interstate rate is an inappropriate comparison to "measure the maximum level of rates on Arkansas Fluxing stone". The similarity of the interstate movement reviewed by the Commission in the *Prairie du Rocher* case was carefully documented in the statements of

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[5] *Houston, East and West Texas Ry. Co.* v. *United States*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914). The decision in this case, commonly known as the "Shreveport case," is generally considered the basis for the enactment of Section 13 (4) which passed Congress in 1920.

appellants.[6] There is no significant difference in the physical characteristics of the movement and there has never been any differentiation made by the Commission, for rate purposes or any other purposes, between fluxing stone for the aluminum industry, the alkali industry, the steel industry or any other industry.

Nevertheless the Interstate Commerce Commission apparently felt that it would not have considered the comparison of this rate appropriate in setting the maximum level of the Arkansas rate on fluxing stone. But that is not within their jurisdiction. The issue is whether the Arkansas rate is a *burden* on interstate commerce. But how can the Arkansas rate be a burden on interstate commerce? Its application is wholly within the state of Arkansas. It is higher than any other fluxing stone rate moving in interstate commerce in the southwest. There is no interstate fluxing stone movement either terminating or originating in Arkansas. There is no reference to any other rate on fluxing stone for the aluminum industry in the United States. Rates are maintained on fluxing stone for the iron and steel industry in the neighboring state of Texas on a lower level that the Arkansas rate. The Commission has approved a lower interstate rate moving through the state of Arkansas on fluxing stone for the alkali industry. To say that rates on fluxing stone for the aluminium industry must be higher than rates of the same commodity for the iron and steel industry or the alkali industry is not only illogical, it is rank dis-

[6] See, for example, pp. 17-18 of Witness Kelly's statement in Statement of Facts and Argument for Alcoa (R. 597-98), where it was pointed out that the volume of movement, the commodity transported, the railroad carrier and conditions of origin and delivery were practically identical.

crimination. Yet this is the effect of the Commission's decision.

It thus seems clear that the Commission's conclusion, as it relates to fluxing stone, did not rest on the determination of burden against interstate commerce, but was founded on its disagreement with the Arkansas Commission as to what was an appropriate maximum rate level. It is here that the Commission has crossed the boundary and has entered into a sphere of regulation which is reserved exclusively for the state agency. The fact that the Commission enlarged the scope of its authority in speaking of the "maximum level" of rates in Arkansas, when rejecting comparison with the lower interstate rates must be considered a significant admission that its conclusion with respect to fluxing stone did not rest on a finding of undue burden against interstate commerce.

Respectfully submitted,

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Dated at Washington, D. C.
March 17, 1967



APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-65-C-52

ARKANSAS GRAIN CORPORATION, *Plaintiff*

and

ALUMINUM COMPANY OF AMERICA and REYNOLDS METALS COMPANY, *Intervening Plaintiffs*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and ARKANSAS COMMERCE COMMISSION, *Defendants*

and

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL., *Intervening Defendants*

Before MATTHES, Circuit Judge, HENLEY, Chief District Judge, and YOUNG, District Judge.

Memorandum Opinion

YOUNG, District Judge.

Statement of the Case.

This action was brought by the Arkansas Grain Corporation under §§ 1336, 1398, 2284, and 2321-2325 of the United States Code, Title 28, seeking to set aside a decision of

the Interstate Commerce Commission (Division 2) entered on September 20, 1965 in *Arkansas Intrastate Freight Rates and Charges,* 326 ICC 19. A three-judge court was constituted as required by statute. The Aluminum Company of America (hereinafter called "Alcoa") and Reynolds Metals Company (hereinafter called "Reynolds") intervened as plaintiffs in the action.

In the decision appealed from, the Commission required the railroads operating in the State of Arkansas to increase intrastate freight rates and charges to the same extent it had previously authorized them to increase interstate freight rates and charges in nationwide revenue proceedings. Acting pursuant to § 13(4) of the Interstate Commerce Act, 49 U.S.C. 13(4), the Commission sought to require the intrastate rates and charges to contribute their "fair share" of the railroad system revenue needs based upon its finding that such rates and charges imposed an undue burden and unjust discrimination on interstate commerce.

The effect of the decision appealed from was to overrule the Arkansas Commerce Commission's orders whereby the Arkansas Commission had permanently suspended certain increased freight rates and charges which had been published by the carriers applicable on intrastate traffic.

Contentions of the Plaintiffs.

All the plaintiffs charge that there is no substantial evidence to support the Commission's finding that intrastate freight rates and charges in Arkansas are unduly low and discriminate against interstate commerce or that conditions incident to intrastate transportation are not more favorable than those incident to interstate transportation of property.

Arkansas Grain further contends that the decision of the Commission is null and void insofar as it applies to soybeans and soybean meal. Alcoa and Reynolds also

contend that the decision is void as it relates to fluxing stone.

Thus, the plaintiffs attack the decision of the Commission in its entirety and also as it affects rates on fluxing stone, soybeans and soybean meal.

Standing to Sue.

Exceptions to the Examiner's recommended report and order (approving the proposed rate increases) were filed with the Commission by three protestants, namely: Reynolds, Alcoa, and Minnesota Mining and Manufacturing Company (the latter not being a party to this action). Arkansas Grain had attacked the proposed increases on soybeans during the hearings before the Examiner; but after the filing of his report with the Commission, which recommended an increase in soybean rates, Arkansas Grain filed no exceptions or other pleadings with the Commission.

In their brief the United States and the Interstate Commerce Commission challenge the standing of Arkansas Grain as a plaintiff in this action, citing *United States* v. *L. A. Tucker Truck Lines,* 344 U.S. 33 (1952). In that case the Supreme Court said, at pp. 36 and 37 of the opinion:

> "We have recognized in more than a few decisions, (footnote omitted) and Congress has recognized in more than a few statutes, (footnote omitted) that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

As stated in the joint brief of the United States and the Interstate Commerce Commission, the Supreme Court has held that each ground for setting aside an agency order that is appealed before a reviewing court must have first been argued to the administrative agency. *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946). By failure to seasonably object to the Examiner's report to the Commission, the Commission was deprived "of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Ibid*, p. 155.

Inasmuch as Arkansas Grain filed no exceptions to the Examiner's Report nor otherwise objected in any manner to the Commission as to the recommendations of the Examiner, it may not now be heard to complain.

Standard of Proof Required to Support the Commission's Findings.

Plaintiffs contend that the proof must meet a higher standard in order to support findings which result in an order under § 13(4) whereby the Federal Commission enters into the field of intrastate commerce, which is a matter within the primary jurisdiction of the state regulatory commission. They say that support for such a finding must meet a "high standard of certainty," *Public Service Commission* v. *United States*, 356 U.S. 421; that justification for the exercise of this exceptional federal power must be "made definitely and fairly apparent," *Chicago M. St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, 306; that scrupulous regard for maintaining the power of the state in this field requires that Interstate Commerce Commission orders must "meet a high standard of certainty," *North Carolina* v. *United States*, 325 U.S. 507; and that "justification of the exercise of federal power must clearly appear," *Florida* v. *United States*, 282 U.S. 194, 211-212.

In *Chicago M. St. P. & P. R. Co.* v. *Illinois, supra,* the Supreme Court said:

> "The occasion for the exercise of the federal power asserted by § 13(4) is the necessity for effecting the required contribution by intrastate traffic of its proportionate share of the revenues necessary to pay a carrier's operating costs and to yield a fair return. When intrastate revenues fall short of producing their fair proportionate share of required total revenues, they work an undue discrimination against interstate commerce, and the ICC may remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce. In determining whether an undue revenue discrimination against interstate commerce is caused by intrastate rates, the ICC may consider 'among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service,' a standard written into 49 USC § 15a(2). No formal requirements are prescribed for the findings to be made by the ICC under § 13(4). Reasonable determinations suffice. But the justification for the exercise of this exceptional federal power to interfere with intrastate rates must be made definitely and clearly apparent." (Citations omitted)

While the occasion for the exercise of the federal power asserted by § 13(4) must be made definitely and clearly apparent, we are convinced that the ordinary substantial evidence rule applies, as this court said earlier in *Arkansas Public Service Commission* v. *United States,* 147 F. Supp. 454, 466 (1956). Such an order by the Commission must be supported by "clear findings supported by substantial evidence."

Scope of Review.

"Substantial evidence" refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229 (1938). "The question of the weight of the evidence is for the Commission and not for the Court," and "it is not the province of the courts to substitute their judgment for that of the Commission, and when the Commission's findings of fact are supported by substantial evidence they are not subject to review." *Florida* v. *United States, supra.*

The Findings Made by the Commission.

Plaintiffs concede that the necessary findings were made by the Commission. They say, "The issue here is that the findings are not supported by substantial evidence." Their precise contentions as expressed in their brief are as follows:

> "Basically the Commission and the Examiner decided that the failure of the Arkansas Commerce Commission to permit application of the ex parte 212 and ex parte 223 increases to intrastate commerce caused an undue burden on and an unjust dicrimination against, interstate commerce. In arriving at the decision the Commission found the following facts, which are essential to its decision, but which are not supported by substantial evidence.
>
> "1). Conditions incident to intrastate commerce were no more favorable than those incident to interstate commerce (Finding 1).
>
> "2). Intrastate rates are unduly low (Finding 3).
>
> "3). Arkansas intrastate rates failed to contribute their fair share of revenues required by the carriers (Finding 3).

"4). The burden against interstate commerce is undue and the lower intrastate rates cause undue, unreasonable and unjust discrimination against interstate commerce (Finding 3).

"The Commission also found that the increased rates will be just and reasonable (Finding 5). This finding is contrary to the evidence in so far as it involves soybeans, soybean meal and fluxing stone in that the evidence shows that intrastate rates on those commodities are already on a higher level than interstate rates."

The Evidence.

Evidence was offered before the Examiner tending to show the following:

During the period of advancing prices after World War II the nation's railroads obtained several general increases in interstate rates to meet their need for additional revenue caused by increased operating costs. The first of these increases became effective in 1946. The latest was in 1960, considered by the Commission in ex parte 223. In a period of approximately three and one-half years, between 1956 and 1960, the railroads had ten separate wage increases totaling 48.5 cents per hour. Wages account for approximately 60% of total expenses. This case involves the efforts of the railroads operating in the State of Arkansas to increase the rates and charges on commodities moving in intrastate commerce in Arkansas corresponding to those authorized by the Interstate Commerce Commission on interstate traffic in ex parte 212 and ex parte 223. The failure to apply these increases to intrastate commerce in Arkansas has deprived the railroads of approximately $1,100,000 in annual revenue.

Costs to the Arkansas railroads have increased at a greater pace than have the increases in freight revenues.

During the four-year period of 1957 to 1960 the rate of return earned by the Arkansas railroads was 3.37%.

Increases in the costs of materials and supplies added approximately $1,200,000 to the costs of operation of Missouri-Pacific for the years between 1956 and 1960.

Interstate and intrastate traffic is normally handled in the same trains. The railroad employees in Arkansas received the same increases in wages as system employees.

Since intrastate traffic originates and terminates within the State, the average haul on such traffic is relatively low in comparison with interstate traffic. A higher percentage of handling of intrastate traffic is by local freight trains. Under the wage schedules, train crews of local freight trains receive a higher scale of wages than do those in through freight service.

Railroad operating costs within the State of Arkansas are increased by twenty percent over normal requirements systemwide because of the Arkansas "full-crew law" which requires railroads in Arkansas to employ a third switchman and a third trainman under certain conditions.

We conclude, therefore, that there was substantial evidence to support the Commission's determination that conditions incident to intrastate commerce were no more favorable than those incident to interstate commerce.

We now turn to Finding No. 3 to the effect that intrastate rates are unduly low; that such rates fail to contribute their fair share of revenues required by the carriers; and that the burden against interstate commerce is undue and the lower intrastate rates cause undue, unreasonable and unjust discrimination against interstate commerce.

The systemwide increases found to be just and reasonable in ex parte Nos. 212 and 223 were based on the needs of the railroads including those in Arkansas for additional revenue to meet increased operating expenses. These

expenses, of course, are incurred on both interstate and intrastate traffic.

The record here contains detailed comparisons of Arkansas intrastate rates with interstate rates to and from Arkansas on the same commodities.

The Commission is not required in a general revenue increase proceeding, of which the present order is an incident, to consider the reasonableness or comparability of rates on individual commodities. The purpose of the order involved here is to eliminate the alleged discrimination against interstate commerce by increasing the intrastate rates to the level of the interstate ones.

The Supreme Court said in *King* v. *United States,* 344 U.S. 254, 275:

> "It is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case.
>
> "'(T)he administrative arm of the Commission (would be) paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

As this court said in *Arkansas Public Service Commission* v. *United States, supra:*

> "Here the Commission has applied to the Arkansas intrastate rates the same conclusions it reached, in Ex Parte Nos. 166, 168 and 175, as to the need of the rail carriers for increased revenue on a national basis and has distributed the burden within Arkansas on the same lines it followed when estimating the revenues available in the southwestern territory from intrastate as well as interstate operations, as was done in Florida

and approved by the Supreme Court in the King case, 344 U.S. at page 272, 73 S. Ct. at page 269, and here, as in that case, "The evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its [Arkansas] order."

The situation here is much like that discussed in *Illinois Commerce Commission* v. *United States,* 292 U.S. 474, where the Court said, pp. 483, 484:

> "The decision in the first proceeding, that the increase in the interstate rate was reasonable, was made in the hope that the state commissions would bring intrastate rates into harmony. When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be raised in order that the intrastate traffic may bear its fair share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the interstate rates more specifically, or to separate intrastate and interstate costs and revenues."

In view of the history of these general rate increases applicable systemwide, or at least thought to be by the Commission when they were approved, we have no doubt but that the Commission's finding that the Arkansas rates were unduly low, did not contribute their fair share to the carrier's revenues, and caused undue discrimination and burden on interstate commerce is amply supported in the record.

Specific Commodity Rates.

The plaintiffs Alcoa and Reynolds not only attack the findings and order on an overall basis, but in particular attack the Commission's findings insofar as they relate to fluxing limestone.

This commodity is taken from quarries located in Myersville, Arkansas, which are owned by Alcoa and a subsidiary of Reynolds. It is processed through a crushing plant before being hauled by Missouri Pacific Railroad Company about 150 miles to the plants of Alcoa and Reynolds at Bauxite, Arkansas. The stone is used in the process of manufacturing aluminum. All of the traffic is handled on the Missouri Pacific. The present rate is $1.38 per net ton. The revenue derived is nearly $1,000,000 annually, and accounts for about 25% of the total intrastate revenue of the Missouri Pacific in Arkansas. The increase sought would amount to twenty cents per ton, which would result in added costs to the plaintiffs Reynolds and Alcoa of something in excess of $100,000 annually. Much of the testimony before the Examiner dealt with this commodity. The Commission's opinion devotes more than seven pages to a discussion of this aspect of the case.

Fluxing stone for the aluminum industries moved under the crushed stone rate prior to the establishment of a separate commodity rate. It is conceded by plaintiffs that the Arkansas rail rate on fluxing stone involved here is lower than the crushed stone rate; but, plaintiffs say, fluxing stone and crushed stone are different commodities. The Commission found that the $1.38 figure per ton was below even the out-of-pocket costs of handling the traffic. Thorough and expert analyses of detailed cost studies were submitted to the Commission by both the aluminum companies and the railroad. The witness Livingston's testimony was devoted entirely to the fluxing stone commodity. He testified that this commodity is merely crushed limestone, which prior to 1956 had always moved on the higher

crushed stone basis; that the reclassification of this commodity during pendency of a previous Thirteenth Section proceeding had the result of reducing the previously applicable rates; that the rates had been depressed even before such reduction; that by reason of the reclassification of the fluxing stone the rates enjoyed by the aluminum companies are far below other limestone rates in Arkansas, and even further below those applicable on interstate shipments of crushed limestone to and from Arkansas. According to Livingston, the rate now sought by the railroads of $1.58 is only a few cents higher than the depression level applicable in 1938.

Another exhibit was offered to show the comparison between the Arkansas rate of $1.38 with interstate rates for like distances between $2.25 and $2.54. A detailed cost study submitted by another witness for the railroads showed the out-of-pocket costs of performing the freight haul of this commodity to be approximately $1.60 per ton, with additional costs of approximately $1.00 if general costs were included.

The plaintiff aluminum companies offered evidence concerning an intrastate rate in Texas on crushed limestone used in the manufacture of iron or steel and a rate published by Missouri Pacific applicable to limestone from Prairie du Rocher, Illinois, to Baton Rouge, Louisiana.

The Interstate Commerce Commission considered the Texas intrastate rates in its opinion in *Texas Intrastate Freight Rates and Charges*, 308 ICC 261. The evidence in that case primarily concerned said, gravel, crushed stone, and related commodities. The Commission found that the railroads' tonnage was declining under the existing rates and that an increase in the Texas intrastate rates would accelerate the diversion to other modes of transportation which would result in a net revenue loss to the railroads. The Commission said in its opinion in this case, "There is no such evidence in connection with the instant proceed-

ing. The Texas case did not approve the depressed rate levels.".

The Examiner noted that the lower Prairie du Rocher rate, which it had found lawful in *Limestone, Prairie du Rocher, Ill. to Baton Rouge, La.*, 313 ICC 71, was a depressed rate established to meet threatened private barge competition, a factor not present in the instant proceeding. However, the Commission did not sustain the fluxing stone rate in this case on that ground. It is at least inferable that the Commission was prepared to hold that since the intrastate rate on fluxing stone was higher than the interstate rate on Prairie du Rocher limestone it did not unjustly discriminate against interstate commerce provided the commodity in Prairie du Rocher was one with which fluxing stone could appropriately be compared. The Commission went on to determine whether comparison of fluxing stone with the commodity in Prairie du Rocher was appropriate. In concluding that comparison was not appropriate the Commission said in part:

> ". . . The commodity description determines the applicable rate, and as indicated by the protestants herein, the considered fluxing limestone description distinguishes that commodity from other crushed limestone. The commodity considered in the *Prairie du Rocher* case can not be transported under the intrastate description considered herein, which is restricted to limestone used for fluxing purposes in the production of alumina; further, there is no showing that the two types of crushed limestone could be used interchangeably, or that they compete with one another in any way. In these circumstances, we conclude that the Prairie du Rocher rate is not an appropriate measure of the maximum level of Arkansas intrastate rates on fluxing stone."

The issues of comparability of commodities and of the validity to be given to the cost data submitted by the con-

tending parties are matters peculiarly within the competence of the Commission. With due deference to the judgment of the Commission regarding these debatable issues, we hold that the clear findings of the Commission with respect to fluxing stone are supported by substantial evidence.

Products of Agriculture, Products of the Forest, and Other Products of Mines.

The Government says that none of the plaintiffs have any standing to question the proposed rates on products of agriculture and forests because: (1) none of the parties excepted to the report of the Hearing Examiner and his recommended order before the Commission; and (2) as to products of agriculture and the forest, the plaintiffs Alcoa and Reynolds do not ship or receive such products and thus are not affected in fact; therefore, having no legally protected interest, they may not sue to set aside such rate. Those plaintiffs do not seem to seriously dispute those principles, but say in their brief that the purpose of the discussion of such commodities (which constitute a substantial portion of the traffic within the State of Arkansas) is that they have an important bearing on whether the evidence establishes that the level of rates in Arkansas is unduly low.

We think that these other rates need little discussion. As we have stated above, this is a general revenue case and it is not necesary to offer proof on each item in each freight tariff as might be necessary in an ordinary rate case. Suffice it to say we have examined the record and find that there was evidence produced before the Examiner from which the Commission could reasonably conclude that those intrastate rates were lower than comparable interstate commerce rates and that they discriminate against interstate commerce.

Counsel for defendants will prepare and submit an appropriate order and decree.

Dated this 1st day of December, 1966.

M. C. MATTHES
United States Circuit Judge

J. SMITH HENLEY
United States District Judge

GORDON E. YOUNG
United States District Judge

Judgment

This Court, having been duly constituted as a Three-Judge Statutory Court pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, and having heard the parties on brief and in oral argument and having entered its opinion of December 1, 1966, in this action,

ORDERS, That the reports and orders of the Interstate Commerce Commission of which complaint is made in the above-entitled action are hereby sustained, and that the above-entitled action be, and it is hereby, dismissed.

This the 16th day of December, 1966.

M. C. MATTHES
United States Circuit Judge

J. SMITH HENLEY
United States District Judge

GORDON E. YOUNG
United States District Judge

INTERSTATE COMMERCE COMMISSION

Service Date
October 12, 1965

No. 34373

ARKANSAS INTRASTATE FREIGHT RATES AND CHARGES

Decided September 20, 1965

(326 I.C.C. 19)

Arkansas intrastate rates and charges found to cause unjust discrimination against, and undue burden on, interstate commerce. Bases for removal thereof prescribed.

James I. Collier, Jr., William E. Davis, Harry B. LaTourette, John E. McCullough, Don McDevitt, and *Robert H. Stahlheber* for respondents.

W. M. Buttram and *Claude Carpenter, Jr.,* for Arkansas Commerce Commission, and *Maurice D. Dyer* for Little Rock Chamber of Commerce and Arkansas Highway Department, protestants.

Joe Baldridge, Paul S. Barnett, J. F. Day, Dickson R. Loos, Phillip A. Martin, Walter B. Smith, and *Jack A. Williams, Sr.,* for other protestants.

Report of the Commission

DIVISION 2, COMMISSIONERS FREAS, WALRATH, AND TIERNEY

WALRATH, *Commissioner:*

Exceptions to the examiner's recommended report and order were filed by three shipper-protestants; namely, Minnesota Mining and Manufacturing Company (3M Com-

pany), Reynolds Metals Company (Reynolds), and Aluminum Company of America (Alcoa), and respondents replied. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

This is an investigation under section 13 (4) of the Interstate Commerce Act, instituted upon petitions filed by the principal railroads operating in Arkansas, to determine whether the rates[1] and charges of the common carriers by railroad, or any of them, for the intrastate transportation of property, made or imposed by authority of the State of Arkansas, cause, or will cause, by reason of the failure of such rates or charges to include increases corresponding to those authorized on interstate traffic in Ex Parte Nos. 212 and 223,[2] any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce; and, if so, what rates and charges, or what maximum or minimum, or maximum and minimum rates and charges, shall be prescribed to remove any lawfulness found to exist.

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[1] Rates, charges, and increases are stated per ton, unless otherwise stated.

[2] Ex Parte No. 212, *Increased Freight Rates, 1958,* 302 I.C.C. 665, and 304 I.C.C. 289; Ex Parte No. 223, *Increased Freight Rates, 1960,* 311 I.C.C. 373; Ex Parte No. 223 (Sub-No. 1), *Minimum Charges Per Car,* 313 I.C.C. 563; Ex Parte No. 223 (Sub-No. 2), *Increased Switching Charges,* 315 I.C.C. 199; 318 I.C.C. 485; and 322 I.C.C. 560; Ex Parte No. 223 (Sub-No. 3), *Increased Rates on Iron Ore,* 313 I.C.C. 549; Ex Parte No. 223 (Sub-No. 5), *Increased Rates on Coal and Petroleum Coke,* 316 I.C.C. 159; Ex Parte No. 223 (Sub-No. 9), *Increased Rates on Fresh Fruits and Vegetables,* 313 I.C.C. 519; and Ex Parte No. 223 (Sub-No. 10), *Increased Freight Rates, 1960 (Rule 7),* 313 I.C.C. 471.

All common carriers by railroad operating in Arkansas, subject to our jurisdiction, were made respondents. Copies of the order of investigation, and orders directing modified procedure and assigning an oral hearing for cross-examination of respondents' witnesses were served upon each of them and on the State of Arkansas and the Arkansas Commerce Commission. Evidence was submitted by the respondents in support of the increases, and by the Little Rock Chamber of Commerce and certain shippers and shipper organizations in opposition to the increases. The Arkansas commission filed a brief in lieu of a statement of facts and argument in opposition to the increases.

Beginning on December 23, 1957, and September 7, 1960, respectively, the railroads filed schedules of increased rates and charges, which were considered by us in Ex Parte Nos. 212 and 223, and with some exceptions, approved for application on interstate traffic. On April 24, 1959, the respondents filed a petition with the Arkansas commission for authority to apply increases on the intrastate traffic comparable to those permitted by us in Ex Parte No. 212. Based on the volume of traffic handled in 1955, the respondents estimated that the increases would yield $281,000 greater revenue annually. The commission denied the petition by order dated January 22, 1960. The respondents, thereafter, filed an intrastate supplement proposing to increase the rates effective October 30, 1962. The supplement was suspended, and the suspension made permanent on July 24, 1963. Estimating that the increases comparable to those approved by us in Ex Parte No. 223 would yield additional revenue of $619,000 annually if applied to Arkansas intrastate traffic, the respondents filed an intrastate supplement proposing such increases to become effective on December 1, 1962, but that supplement was suspended, and the suspension was made permanent on December 18, 1963.

The examiner found that the transportation conditions are not more favorable on Arkansas intrastate traffic than

on the interstate transportation of freight in Arkansas and the adjoining States; that the intrastate rates and charges are unlawful because they are abnormally low, are not contributing their fair share to the revenue needs of the respondents, and are causing an undue burden on interstate commerce; that the increases authorized by us in Ex Parte Nos. 212 and 223 on interstate traffic are just and reasonable; and that the unlawfulness would be removed by increasing the intrastate rates the same as the interstate rates were increased on traffic moving to, from, or through Arkansas (but not increasing intrastate rates to levels higher than the interstate rates on like traffic to, from, or through points in Arkansas for like or greater short-line distances over the same lines of railroads); and that such action will substantially increase respondents revenues, and is required to provide adequate and efficient railway service.

The three shippers except to the examiner's conclusions on the facts of record. While general exceptions were made to the effect of the findings on all traffic, Alcoa's arguments are directed principally to their effect on traffic in fluxing limestone, Reynolds', to fluxing limestone and alumina and the 3M Company's, to crushed stone, sand, roofing granules, and concerning the intrastate switching charges. Under the circumstances, we deem it necessary to discuss only the pertinent matters raised on exceptions, and, except as modified herein, we adopt the examiner's findings and conclusions as our own. Portions of the examiner's report, including his lettered appendixes A and B, are shown in appendix I hereto. Alcoa and Reynolds also except to the examiner's rulings on certain motions to strike, which are considered in detail in appendix II hereto. The examiner's rulings are affirmed.

General exceptions.—Alcoa argues that the examiner's findings are not supported by conclusive evidence, citing *Public Service Comm. of Utah* v. *United States,* 356 U.S.

421. In that case, the Court was primarily concerned with the lack of positive evidence of cost and expense of handling traffic intrastate as against interstate. Subsequent to that decision, section 13 of the act was amended to permit a finding of undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce without a separation of interstate or intrastate property, revenues, and expenses. Moreover, the Court indicated that section 13 contemplated an inquiry into intrastate rates and conditions, and that our conclusions must be based on more than assumptions. The Court did not require detailed studies and comparisons, however.

Basically, this protestant contends (1) that the Arkansas intrastate rates are not so low as to cast a burden upon interstate commerce, and (2) that the intrastate transportation conditions are more favorable than those incident to interstate commerce. In connection with the first contention, the examiner after setting forth an extensive discussion and analysis of evidence relative to the respondents' need for additional revenue from Arkansas intrastate traffic, concluded that the operating ratios of the Arkansas class I railroads increased from 86.99 percent in 1952 to 89.16 in 1957, reaching an all-time high of 90.76 percent in 1960. Alcoa excepts to the use of these ratios because they are based on total expenses, operating and nonoperating; and also to the examiner's failure to consider Alcoa's computation of the respondents' operating ratios for the years 1960, 1961, and 1962, respectively, of 74.36, 68.77, and 64.65 percent, which are based on the Arkansas interstate and intrastate operations, as reported by the respondents to the State commission. The entire cost must be taken into account. Cf. *Northern Pac. Ry. Co.* v. *North Dakota,* 236 U.S. 585, 596-597. Further, the systemwide expenses are entitled to greater consideration in this general revenue proceding. See *State Corp. Comm. of Kansas* v. *United States,* 216 F. Supp. 376, affirmed

per curiam, 375 U.S. 15. Moreover, the operating ratios based on the Arkansas traffic are understated. They include both interstate and intrastate traffic, but not all the expenses on interstate traffic; for instance, 50 percent of the traffic moves through the State, and there are no origin or destination terminal expenses within the State on such traffic. The comparisons of these State ratios with systemwide ratios are of no value to establish that the intrastate traffic is more compensatory than the system traffic. Finally, it is argued that the improved operating ratios after 1960 establish that the increases are not justified. The examiner found that the respondents' total operating ratios declined from 90.76 percent in 1960 to 90.29 and 89.29 percent, respectively, in 1961 and 1962. Such improved operating ratios reflect the increases on interstate traffic, and do not justify omitting the increases from intrastate commerce.

In connection with the second contention mentioned above, the examiner, in finding that the conditions incident to intrastate transportation of freight are not more favorable than those incident to the interstate transportation of freight, relied upon evidence of increased tax payments to the State, the State's full-crew law (which requires an additional switchman in certain instances), the shorter hauls for intrastate traffic, the spread of the cost of two terminals over such short hauls, the higher percentage of intrastate traffic than interstate traffic moving in local freight trains, the higher scale of wages for freight train and engine crews on local trains than for similar crews on through trains, and the increases in wage rates and costs of material and supplies. Against this showing, the protestants refer to certain favorable aspects of Arkansas traffic, namely, that it is generally heavy loading and moves in large volume, consisting of products of agriculture, forests, and mines, and that it generally moves to and from small terminals which are less expensive to operate. While those are factors to weigh, the evidence is convincing that

the overall conditions of handling the intrastate commerce are not more favorable than those related to the handling of interstate commerce.

Fluxing limestone.—This is one of the principal commodities involved in this proceeding. It is taken from quarries located at Myersville, Ark., which are owned by Alcoa and a subsidiary of Reynolds. It is processed through a crushing plant before being given to the Missouri Pacific Railroad Company for hauling about 150 miles to Alcoa's refining plant at Bauxite, Ark., or Reynolds' plant at Bauxite (Bauxite Junction),[8] Ark. Reynolds also obtains some of its fluxing limestone at Limedale, Ark., which is on the Missouri Pacific, about 136 miles from its plant. The product, valued from 125 to 150 cents a ton, is used in the process of manufacturing aluminum, and the total movement averages about 450,000 tons a year.

From Myersville and Limedale the commodity is transported by the Missouri Pacific 51 and 34 miles, respectively, to the intermediate point of Newport, Ark. The movement from Myersville is handled in a local freight train which operates 6 days a week from Newport to Guion, Ark., and return, 112 miles. Three diesels are required to handle the stone traffic from Myersville to Newport because of a restricted grade of 1.10 percent for southbound traffic south of Batesville, Ark. The fluxing stone is moved from Newport 82 miles to North Little Rock, Ark., and then 20 miles to Bauxite Junction, where it is transferred to the Bauxite & Northern Railroad Company for delivery at Bauxite. The Missouri Pacific pays the switching charge. There is no northbound movement from Bauxite.

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[8] The Reynolds' plant is located within the Bauxite switching limits of the Missouri Pacific, and the Bauxite Junction switching limits of the Chicago, Rock Island and Pacific Railroad Company.

The present intrastate rate on fluxing limestone used in production of alumina,[4] and to these points, is 138 cents, and the respondents desire to increase it to 158 cents. The present rate reflects an intrastate rate of 116 cents, prescribed by the Arkansas commission by order entered May 3, 1956, as subsequently increased under Ex Parte Nos. 196 and 206.[5]

The examiner found that prior to the order of May 3, 1956, this commodity had moved from Myersville and Limedale to Bauxite at truck competitive rates on sand, gravel, crushed stone, and related commodities; that there is no difference between this fluxing limestone and crushed stone, except the ultimate use; and that the State commission reclassified the commodity and prescribed lower rates than the stone rates from and to the points here involved. Alcoa and Reyolds except to the examiner's conclusions. They contend that the fluxing stone is a raw material used in the manufacturing process, which generally has a regular heavy movement in multiple-car or trainload lots between specific points, whereas crushed stone is usually a building ingredient or road aggregate, which does not have the same transportation characteristics as fluxing stone. Fluxing stone and crushed stone are classified separately in our freight commodity statistics, and we have recognized that different rates may be maintained thereon, *Dolomite and Fluxing Stone,* 128 I.C.C. 23, 25, and *Rates*

[4] Subject to the following: Limestone, run of the crusher, to be used only for fluxing purposes in the production of alumina, minimum weight 1,500 net tons, to be shipped on one day from one consignor to one consignee. The minimum weight may be met by including the aggregate tonnage shipped from Limedale with the tonnage shipped from Myersville upon the same day to the same consignee, without penalty.

[5] Ex Parte No. 196, *Increased Freight Rates, 1956,* 298 I.C.C. 279, and Ex Parte No. 206, *Increased Freight Rates, E. and W. Territories, 1956,* 299 I.C.C. 429 and 299 I.C.C. 557, and *Increased Freight Rates, E., W., and S. Territories,* 300 I.C.C. 633.

on Raw Dolomite and Fluxing Stone in Ohio, 188 I.C.C. 495, 499. In these cases, however, there was no question that fluxing stone is a type or grade of crushed stone, and that in the absence of specific rates on fluxing stone, the crushed stone rates would apply. The protestants also refer to *Arkansas Public Service Comm.* v. *United States,* 147 F. Supp. 454, as affirming the fact that fluxing stone is a separate and distinct commodity. But the court in that case observed, at page 457, that in the absence of an order, or a voluntarily established commodity description and rate in terms applying specifically to crushed stone for industrial or fluxing uses, the stone referred to moved under the Missouri Pacific's Arkansas intrastate rate applicable to "crushed stone."

The examiner referred to the various changes in rates since 1929. He used single and joint-line rates, based on distances to Bauxite from Limedale and Myersville,[6] respectively. The Arkansas commission prescribed maximum reasonable joint-line rates from these origins in 1929 of 135 and 140 cents, which were increased under an ex parte increase proceeding, reduced by order of the State commission, and also voluntarily, so that in 1939 they were 119 and 123 cents. In 1947 they were increased to 134 and 138 cents, as authorized in Ex Parte No. 162.[7] By changing to the single-line scale[8] in 1949, they were reduced

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[6] Reynolds notes on exceptions that the station Myersville was not in existence in 1929. Reynolds developed a quarry in Izard County, Ark., adjacent to the Missouri-Pacific's White River Line, approximately 5 miles south of the station of Guion, which became known as the nonagency station of Myersville, and shipments began moving therefrom in the fall of 1947.

[7] Ex Parte No. 162, *Increased Railway Rates, Fares, and Charges, 1946,* 266 I.C.C. 537.

[8] On September 15, 1949, Bauxite was placed in the switching limits of Bauxite Junction, on limestone only. Joint-line scales were used prior to that date, and single-line scales thereafter.

to 121 and 129 cents, but were increased in 1951 to 128.3 and 136.7 cents as authorized in Ex Parte No. 175.[9] The State commission order of May 3, 1956, reduced the rates to 116 cents from both origins, but they were increased to 123 and 138 cents on June 15, 1957, and October 23, 1958, under Ex Parte Nos. 196 and 206. Including the increases authorized through Ex Parte No. 196, the single-line rates for the distances from the respective origins would have been 226 and 241 cents on the maximum scale prescribed in 1929, 220 and 237 cents on the scale prescribed in 1939, and 187 and 198 cents on the scale reflecting the present truck compelled intrastate rates applicable on sand, gravel, and crushed stone. The present single-line interstate rates, for the same distances, would be 225 and 239.

Aloca presented evidence comparing the level of the Texas intrastate single-car rates on crushed limestone used in the manufacture of iron or steel within that State with the level of the Arkansas intrastate multiple-car rate on fluxing limestone. The examiner stated that the comparisons were intended to show that the Arkansas rate was higher than the Texas rates. Alcoa claims that the examiner erred, and that the comparisons were presented to establish that the Arkansas rate is not a burden on interstate commerce, since the lower Texas intrastate rates on sand, gravel, crushed stone, and related articles at their present levels were found not to cause a burden on interstate commerce in *Texas Intrastate Freight Rates and Charges,* 308 I.C.C. 261. To find revenue discrimination evidence that increased intrastate rates will result in increased revenue to the carriers must be presented. *Florida* v. *United States,* 282 U.S. 194. The evidence in the *Texas* case primarily concerned sand, gravel, and other aggregates of types widely available, which were

[9] Ex Parte No. 175, *Increased Freight Rates, 1951.* 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, 289 I.C.C. 395, 292 I.C.C. 23, and 297 I.C.C. 17.

particularly susceptible to competition from local wayside pits with short motor hauls to consuming points, and there was evidence of competition with shells brought in by barge. The railroads participation in the Texas sand and crushed stone tonnage had declined from 59 percent in 1949 to 21 percent in 1956 (the last year shown in the report). The evidence indicated that the railroads sand and gravel tonnage was declining at the then-existing rates, and that an increase in the Texas intrastate rates would accelerate the diversion resulting in a net revenue loss to the respondents. There is no such evidence in connection with the instant proceeding. The *Texas* case did not approve the depressed rate levels.

The intrastate rate of 138 cents, minimum 1,500 tons, over the 150-mile route considered herein is compared with an interstate rate on limestone[10] of 230 cents (increased to 240 cents under Ex Parte No. 223), minimum 2,500 tons, from Prairie du Rocher, Ill., to Baton Rouge (North Baton Rouge), La., 735 miles, maintained by the Missouri Pacific over routes which pass through Arkansas for distances of 267 and 304 miles. The compared rate was found lawful in *Limestone, Prairie du Rocher, Ill., to Baton Rouge, La.*, 313 I.C.C. 71. The latter produces car-mile earnings of approximately 24.23 cents, and assuming that the car moves 304 miles within Arkansas, the per-car revenue within the State would be $73.66. The intrastate fluxing limestone rate yields over $120 per car for 150 miles, greater revenue for less than one-half the distance. Also, the multiple-car intrastate rate is a higher percentage of the corresponding single-car class rate, and of the various stone rate scales, than the compared interstate rate. The examiner noted that the compared rate was established to meet threatened private barge competition, which is not present in the instant proceeding. However, in *South*

[10] Crushed (not ground), run of the crusher, ranging in size from 0.25 inch to 10 inches.

Carolina Intrastate Freight Rates and Charges, 300 I.C.C. 307, 310, it was found that an intrastate rate level on pulpwood which exceeded the lowest interstate rate level from points in the same State, on the same commodity, with which it could appropriately be compared, did not unjustly discriminate against interstate commerce. Thus, the question is whether an appropriate comparison has been made. The commodity description determines the applicable rate, and as indicated by the protestants herein, the considered fluxing limestone description distinguishes that commodity from other crushed limestone. The commodity considered in the *Prairie du Rocher* case can not be transported under the intrastate description considered herein, which is restricted to limestone used for fluxing purposes in the production of alumina; further there is no showing that the two types of crushed limestone could be used interchangeably, or that they compete with one another in any way. In these circumstances, we conclude that the Prairie du Rocher rate is not an appropriate measure of the maximum level of Arkansas intrastate rates on fluxing stone.

Alcoa compares average car-mile earnings of class I railroads on all traffic within Arkansas with the car-mile earnings from the Myersville-Bauxite movements. Comparisons of earnings from all freight, however, furnish no adequate measure of the reasonableness of a rate on a particular commodity. *Sugar from Massachusetts to Pennsylvania,* 298 I.C.C. 79, 81, and *Grain, Baltimore & O. R. Points to Ohio River Crossings,* 280 I.C.C. 537, 541.

Cost evidence—Alcoa and the respondents presented studies showing the out-of-pocket costs of transporting fluxing stone from Myersville[11] to Bauxite Junction. The studies were developed using Rail Form A, a formula for use in determining rail freight service costs prepared

[11] Respondents also included Limedale.

by our cost finding section, and the Missouri Pacific's statistics for 1960. The studies reflect adjustments which the parties view as characteristic of this movement.

As originally presented, the studies considered the empty return factor to be 100 percent. In its exceptions, Alcoa developed an empty return factor of 46 percent based on the distance an empty car is moved from the main line point, Newport, to Meyersville for loading, plus the distance the unloaded car is moved from Bauxite to North Little Rock, where the empty cars are usually held awaiting orders. This total distance is 46 percent of the distance the fluxing limestone is hauled. The protestant contends that a similar procedure was followed in cost studies in the *Prairie du Rocher* case. In that case, the evidence indicated that many of the cars utilized would have moved empty from the North to the South if that limestone traffic should be lost; in the instant fluxing limestone movement, some of the empty cars are moved to Myersville from the southern holding points, such as North Little Rock, and points in Louisiana. While other cars moved from northern holding points, the use of the 46 percent empty return ratio would understate the out-of-pocket cost for handling the movement. Without a special study, we are convinced the 100 percent empty return ratio should be used.

Station clerical costs in Alcoa's study include several computed items, for instance, the cost of superintendence, auditing, and claim work.[12] These costs were made to bear the same relationship to the total salaries paid at Batesville and at Bauxite Junction (less an amount chargeable to running expense) as the portion of each comparable

[12] As shown in Rail Form A, Schedule A: superintendence (line 105, column 8); station supplies and expenses (line 110, column 8); stationery and printing, other expenses, insurance, injuries (line 115, column 8); and salaries of general office clerks for auditing, interline settlement, claim work, and so forth (line 165, column 7).

account, allocated to station service in the Missouri Pacific's Rail Form A for 1960, bears to the station employee's account (less running expense) in the same form. The station employees account in Rail Form A includes salaries of other than the local station employees, and the relationship which Alcoa seeks to use would therefore understate the cost of the items which it constructs.

Alcoa also constructs the cost of maintenance of way and structure, included in station clerical costs, by relating such costs to the valuation it determined for buildings on the right-of-way at Batesville and Bauxite Junction, using the same ratio which it determined the maintenance expenses accounts bore to the station and office building account in Rail Form A prepared from the Missouri Pacific's statistics for 1960. However, the construction of the maintenance of way and structure expense on the value of buidlings at origin and destination stations is an improper base which excludes such costs as buildings at other than origin and destination.

Finally, Alcoa refers to the station clerical costs computed by the Missouri Pacific in the *Prairie du Rocher* case of 35 cents a car. In that case, at least 34 cars were given to the Missouri Pacific at one time, and they were handled as a unit in through trains, without switching except at origin and destination. In that situation, the station clerical costs were adjusted to include one bill per shipment of 34 cars.

Alcoa also excepts to the examiner's failure to use average train costs in determining the line-haul cost between Newport and North Little Rock. This is a through movement of 82 miles between concentration points in heavier train than the average through trains. It is actually handled in local trains or in so-called through trains. When the latter are used, local train wage rates are paid to the crews. The use of average train costs is not proper in determining the out-of-pocket cost for the known movement of traffic. Average train costs are normally used

where shipments move via several routes with varying distances in way-train and through-trains.

There are two intertrain switching movements involved in handling the fluxing limestone movement from Myersville to Bauxite, one at Newport and the other at North Little Rock. The respondents' witness, a chief cost accountant, had special studies made to determine the time required to switch cars of fluxing stone at these points. When the local train enters the yard at Newport with an average of 60 cars per day, switching time averages 0.36 minute per car. Because of the maximum capacity of a single track at the Newport yards, the engine is required to switch the cars one or two times onto different tracks before the entire train is in the yard. The fluxing limestone movement does not always arrive in a block; some days the cars are mixed in the train, thereby requiring an average yard engine time of 1.18 minutes per car to switch and place the cars on a designated track. In addition to the 0.36 and 1.18 minutes per car, 1.57 minutes per car are required in switching this traffic for placement in the trains for further movement to North Little Rock. This adds up to 3.11 minutes per car at Newport. The witness was not able to explain on cross-examination whether the delays in switching were caused by the movement of the fluxing limestone cars or of the other cars in the train. However, if we substitute the average switching cost of $9.60 per car for the computed figure of $10.73, it would only make a difference of 1 or 2 cents in the costs.

Considering all of the evidence and arguments of record, it is clear that the out-of-pocket cost of 157 cents a ton developed by the examiner in his restatement is overstated by a few cents. However, we are convinced that the present rates of 138 cents on this traffic is below the out-of-pocket cost, and is therefore clearly below a maximum reasonable level.

Alumina—Practically all of the Arkansas intrastate movement of this commodity is from Reynolds' plant near

Bauxite Junction to its plants at Jones Mills on the Rock Island, 25.5 miles, and at Gum Springs on the Missouri Pacific, 53.3 miles. The respective rates to these plants since 1958 have been 95 and 136 cents, minimum 40 tons, which the respondents desire to increase to 115 and 160 cents. The present rates for a like movement in interstate commerce are 270 and 330 cents.

Reynolds also operates aluminum reduction plants outside Arkansas, and it compares the interstate and intrastate rates on alumina from Bauxite to representative points, in effect on January, 1958, which included the Ex Parte No. 206-A increases,[18] with the rates as changed since then. It also compares the various earnings at such rates. The following table, taken from that evidence, compares the January 1, 1958 rates and the 1963 rates, which latter include all applicable increases, and the rounded average earnings for the latter year.

		1963					
From Bauxite Ark., to—	Distance Miles	1958 Rate[1] Cents	Total Rate[1] Cents	Total Carloads	Tons[2]	Car	Average Revenue per Car-mile Cents
Jones Mills, Ark.	25.5	95	95	2,442	138	$ 54	210
Gum Springs, Ark.	53.3	136	136	959	75	106	199
Listerhill, Ala.	313	600	500	219	15	339	108
Rooseveltown, N. Y.	1,405	1,320	1,039	440	35	815	58
Troutdale, Oreg.	2,398	1,241	1,226	270	17	781	33
Longview, Wash.	2,457	1,241	1,226	470	30	783	32
Mead, Wash.	2,365	1,241	1,226	2,420	155	787	33

[1] Per ton.

[2] In thousands of tons.

The interstate rates are multiple-car rates subject to minima of 1,000 tons to destinations in New York and Alabama, and 1,800 tons to those in Oregon and Washington. The intrastate rates are subject to a minimum of 40 tons.

[18] Ex Parte No. 206-A is the latest increase in Ex Parte No. 206.

The examiner concluded that the minimum weight had to be considered in connection with the rates to determine their reasonableness. Reynolds, however, urges that the average car-mile earnings offer a means of testing the relation of the rates with those on like traffic. In a number of recent proceedings, for example the *Prairie du Rocher* case, we have considered multiple-car rates, and such rates are always less than the single-car rates on like traffic. The minimum weight must be considered in evaluating the car-mile revenue comparisons.

The examiner also noted that car-mile earnings usually should be higher for shorter than for longer distances. Reynolds argues that they should not be seven times higher. However, this protestant is comparing average car-mile earnings from hauls of 25 and 50 miles with those from hauls up to 2,400 miles. In view of the differences in distance, the comparisons are of little value.

The interstate multiple-car rates range from 6.4 to 9.6 percent of the corresponding first-class rates between the points, whereas the Arkansas intrastate rates are 4.2 and 5.2 percent of such rates. If the intrastate rates are increased under Ex Parte Nos. 212 and 223, they would be 5.1 and 6.1 percent of such class rates. The examiner therefore concluded that the intrastate rates were on a lower level than the interstate rates. The rates are not constructed with relation to the class rate structure, and Reynolds urges that the percentage relationship is not pertinent. Both the interstate and intrastate rates in 1958 contained the Ex Parte No. 206-A increase, and the present rates related to those rates indicate that the intrastate rates have remained the same, but that the interstate multiple-car rates have been reduced. The respondents refer to higher single-car interstate rates. The circumstances and conditions governing the establishment and maintenance of single-car and multiple-car rates are different, and we do not consider the respondents' action in

reducing the multiple-car rates as justifying the omission of the Ex Parte Nos. 212 and 223 increases from the single-car rates.

Sand, gravel, and crushed stone.—Interstate rates for these commodities were prescribed in *Sand, Gravel, Crushed Stone, and Shells,* 155 I.C.C. 247, and *Sand, Gravel, and Crushed Stone,* 177 I.C.C. 621, and the same scales were approved for application within Arkansas. The effective scale in 1939 was reduced by the Arkansas commission for distances of 200 miles or less, and as thus modified is presently in effect on the intrastate traffic, except where specific rates are maintained. In addition, the respondents established truck competitive rates scales applicable on interstate and intrastate traffic. The Arkansas commission declined to authorize Ex Parte Nos. 206, 212, and 223 increases in connection with the intrastate scales.

On June 21, 1960 (prior to the increases authorized in Ex Parte No. 223), the Arkansas railroads, except the Rock Island and the St. Louis-San Francisco Railway Company, established reduced single-car and five-car rates for distances up to 110 miles, on sand, gravel, and crushed stone in open-top cars, minimum 65 tons or full visible capacity of the car, but not less than 50 tons. The Ex Parte No. 223 increase has not been authorized in connection with these rates, and the respondents seek to so increase them.

The intrastate rates on these commodities in all types of cars, increased as sought, would be no higher than the concurrently effective interstate rates for like movements. Using the open-top car rates, for example, the present interstate rates for distances up to 200 miles range from 135 to 320 cents for single-line hauls and from 163 to 338 cents for joint-line hauls. Increased as sought, the corresponding intrastate rates would range from 113 to 286 cents, and from 139 to 301 cents. The interstate truck compelled rates for distances up to 500 miles range from

89 to 401 cents for single-line hauls and 116 to 401 cents for joint-line hauls (rates for distances less than 110 miles are for the Rock Island and the Cotton Belt). The comparable intrastate rates, increased as sought, would be from 81 to 359 cents, and from 105 to 359 cents. For 110 miles, the interstate rate is 202 cents for single-line hauls and 225 cents for joint-line hauls. The latest reduced intrastate rate (for carriers applying them) for distances up to 110 miles, increased as sought, would be 174 and 195 cents for single-car movement, and 172 and 193 cents for five-car movement.

The intrastate rates on roofing granules for distances up to 500 miles, range from 115 to 538 cents for single-line movements and from 143 to 538 cents for joint-line movements. The interstate rates for like movements range from 144 to 558 cents, and from 173 to 558 cents. The intrastate rates, increased as sought, for distances up to 200 miles, would range from 135 to 364 cents for single-line hauls and 163 to 383 cents for joint-line hauls. Beyond 200 miles, the interstate and intrastate rates would be the same.

The respondents seek to limit the prescription of increases in connection with certain point-to-point intrastate rates on sand, gravel, and crushed stone. The examiner would require that all intrastate rates be increased the same as the interstate rates on like traffic. On the limited evidence in the record, with respect to this matter, we can find no reason for treating the point-to-point rates different from the scale rates on these commodities.

The record indicates that some interstate shipments moved to points in Arkansas. There is no evidence, however, to support a finding that the Arkansas rates cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and, on the other, interstate or foreign commerce.

The 3M Company and its subsidiary, Big Rock Stone and Material Company (considered as one protestant herein), at Little Rock and North Little Rock, Ark., produce sand and various types of stone used principally in building and improving highways, concrete construction work, and river revetment work. About 90 percent of this company's total tonnage moves intrastate. In 1962, it shipped 1.76 million tons of sand and crushed stone, and 56 thousand tons of roofing granules to destination in Arkansas. In that year, 15 of the destinations received a total of 420,000 tons of crushed stone in cars averaging 65 tons each. To these destinations, the distances ranged from 14 to 131 miles, and the rates ranged from 88 to 187 cents, which yielded from 66.9 to 291.5 cents a car-mile. In the same year, 7 of the destinations received a total of 33,041 tons of sand in cars averaging 65 tons each. To these destinations, the distances ranged from 14 to 214 miles, and the rates ranged from 65 to 239 cents, which yielded from 73 to 311 cents per car-mile.

The protestant compared the car-mile earnings from its sand and crushed stone shipments with average car-mile earnings shown under certain commodity groups in Carload Waybill Statistics, 1961. For instance, a 64-mile haul of crushed stone yielded 106 cents, as compared with the Arkansas average of 102 cents for 75 miles for commodities in group 329. Further, a 55-mile haul of sand yielded 121 cents, as compared with the Arkansas yield of 119 cents for a 60-mile haul of commodities in group 327, gravel and sand, n.o.s. The examiner concluded that the earnings from the waybill study reflected an average of earnings from shipments of related commodities in the group and are not appropriate for measuring earnings on particular shipments. In connection with a comparison of earnings from the protestant's shipments with the average car-mile revenue from all traffic handled by the railroads within Arkansas, the examiner noted that the Commission in numerous cases has pointed out the impracticability of measuring the rates in this manner.

In view of the revenue comparisons, and the respondents' failure to make studies to determine the revenue attributable to interstate and intrastate traffic, the 3M Company excepts to the examiner's finding that these intrastate rates are unduly low. It is not necessary to separate the revenue and costs as between interstate and intrastate traffic to find discrimination under section 13 of the act as amended. Moreover, in a general revenue proceeding, it is not necessary to develop a full rate case for each item and each freight rate. *King* v. *United States,* 344 U. S. 254, 272-275, and *United States* v. *Louisiana,* 290 U. S. 70, 79. The evidence is convincing that the intrastate rates are on a lower level than the interstate rates on like volumes of the same commodity moving comparable distances. Thus, the differences in the revenues shown is caused by using averages of revenues from groups of shipments of related articles. The comparisons are not convincing that the intrastate traffic is more remunerative than comparable interstate shipments.

Sand, gravel, and crushed stone are susceptible of diversion from rail to truck movements because of competition with "portable" plants which move from place to place, and with wayside pits. To counteract some of this competition, in 1961 and 1962, respectively, the 3M Company moved 51 and 71 percent of its intrastate sand and crushed stone tonnage by truck. About 80 percent of this protestant's tonnage moved less than 90 miles. Trucks are used for hauling riprap stone up to 125 miles, other crushed stone up to 80 miles, and sand up to 45 miles. To further meet the competition, the protestant purchased 10 trucks capable of moving from 12 to 15 tons of crushed stone and sand. The use of such trucks will eliminate a charge of 25 cents a ton on quarry stone and 15 cents a ton on other crushed stone for unloading cars at the rail siding.

The protestant contends that if the increase becomes effective, it will accelerate the diversion of this traffic from

rail to truck service and expand the use of portable plants and wayside pits. It is expected that the increase in the rates on roofing granules will encourage the practice, now engaged in by some manufacturers, of hauling this commodity by truck. The protestant argues that all of the operating factors in the *Texas* case are similar to the transportation conditions in this proceeding. In the *Texas* case, however, the evidence indicated that the existing rail rates caused the diversion of all but about 21 percent of the tons of these commodities sold or used in the State. The Highway Department of Texas, which estimated that it would use over 5 million tons of aggregates in 1 year, investigates wayside pits near jobsites in order to assure bidders that certain pits contain acceptable material for the particular job. Even though the pits were on a rail siding. truck service was usually preferred because of its efficiency in handling movements from the nearby pits. The general evidence of the diversion from rail service in the instant proceeding is not similar.

Switching charges.—The Arkansas class I railroads have experienced an increase in the cost of performing this service. From 1950 to 1960, the cost of the average yard engine increased from $14.46 to $22.83 an hour, and the yard labor costs increased from $1.619 to $2.859 an hour. The western district (which includes Arkansas) cost for switching a car increased during those years from $36 to $63 for boxcars, $39 to $67 for gondola, hopper, flat, and stock cars, and $33 to $53 for refrigerator and tank cars. The western district out-of-pocket costs in 1960 for switching a boxcar, railroad-owned and shipper-owned, or leased, respectively, were $38 and $24 intraterminal, and $57 and $39 interterminal. Such out-of-pocket costs per car for intraplant switching for railroad-owned and shipper-owned or leased, respectively, were $16 and $8 for an intraplant move, $24 and $15 for an intraplant move and pulling car, and $32 and $21 for spotting car, intraplant move, and pulling car. The costs for other type cars are somewhat higher.

Based on a special study made by the Arkansas class I railroads, it is estimated that annual revenues totaling $296,659 would accrue from the increases sought herein on the various types of switching services performed by them within Arkansas.

Various switching services are performed for the 3M Company, and the increases sought herein would increase its switching charge per car from $16.44 to $24.76 for an interterminal switch, from $15.31 to $23.58 for an intraterminal switch, and from $14.37 to $21.87 for an intraterminal switch applicable on a minimum of 20 cars. In the year 1962, this protestant paid switching charges on more than 16 thousand cars loaded with more than 1.3 million tons of crushed stone and sand. The increases in switching charges sought would have amounted to $125,924. Of this amount, $94,987 represents the increase in charges for switching a minimum of 20 cars of crushed stone from the plant at the subsidiary's quarry to the 3M Company's granule plant.

In 1958 or 1959, this protestant and the Missouri Pacific made an arrangement to facilitate the switching of crushed stone from the quarry to the granule plant, and to reduce the cost. The trackage at the quarry was increased and rearranged so that blocks of 20 cars could be delivered to the Missouri Pacific. On September 10, 1959, the Missouri Pacific reduced the switching charge to $14.37 per car, minimum 20 cars per shipment. The increases sought would be in connection with this low base.

At present the quarry uses 110- and 140-ton cars, which are loaded to capacity. The cars are weighed on the subsidiary's scales and blocks of from 20 to 40 cars (including cars for other than the granule plant) are moved about 2 miles by the subsidiary's engine for delivery at the Missouri Pacific's connection. This connection is about 3⅛ miles from the granule plant. There are 3 tracks at the granule plant with a capacity of 15 cars each. The

Missouri Pacific's switch engine delivers loaded and empty cars to the granule plant and at the same time picks up loaded and empty cars. The crushed stone is unloaded the same day it is delivered. In 1962, 12,665 cars with 1,055,075 tons of crushed stone were switched in this way, and the switching charges were $181,996. As noted, if the switching charges are increased as sought, a like movement would cost the protestant an additional $94,987.

The 3M Company made some preliminary studies regarding the possibility of moving stone by truck from the subsidiary to the granule plant. The present switching movement costs 19 cents per ton on an average loading of 75 tons per car, and to this must be added about 5 cents per ton for the operating of the subsidiary's switching engine. If the increases are added, the overall cost computed in this way would amount to 29 cents a ton. The protestant estimates that it could handle this traffic in its own trucks for about 23 cents a ton. The distance is about 5 miles over the public highway and city streets from the subsidiary's plant to the granule plant. Further, the subsidiary owns all but three-eighths of a mile of right-of-way between its plant and the granule plant, and the possible construction of a private road would reduce the highway mileage almost one-half. The protestant's evidence is not convincing that traffic will be diverted, since there is no basis shown for the estimated truck cost and no reason shown for basing the switching costs on average loading of 75 tons per car, when 90 to 95 percent of the traffic in 1963 moved in 140-ton capacity cars.

The protestant urges that the western district costs do not reflect the actual cost within Arkansas, and do not support approval of the increase in switching charges, citing *Lynchburg Foundry Co.* v. *Atchison, T. & S. F. Ry. Co.*, 279 I.C.C. 171, 175. The statement in that proceeding while criticizing territorial costs, did not indicate that they should be ignored, particularly where, as here, the proposed in-

creased switching charges are substantially below the out-of-pocket territorial cost. Cf. *Pig Iron from Birmingham, Ala., and Rockwood, Tenn.*, 303 I.C.C. 451, 453.

General discussion.—The increases found to be just and reasonable in Ex Parte Nos. 212 and 223 were based on the respondents' and other railroads' need for additional revenue to meet increased operating expenses. These expenses are incurred on both interstate and intrastate traffic. The respondents seek from the Arkansas intrastate traffic a revenue contribution to these operating expenses more nearly proportionate to the contribution made by such traffic prior to the increases authorized in Ex Parte Nos. 212 and 223. The Commission has recognized such prior contribution as a valid criterion of fairness. See *North Carolina Intrastate Freight Rates and Charges*, 293 I.C.C. 541. The evidence is persuasive that the Arkansas intrastate traffic is no less able to bear the increases sought than the interstate traffic to, from, and through that State. The conditions incident to such intrastate transportation of freight are no more favorable than to such interstate transportation of freight. To the extent that the Arkansas intrastate rates and charges do not reflect the Ex Parte Nos. 212 and 223 increases, they fail to provide their share of the additional revenue, and cause unjust discrimination against, and an undue burden on, interstate commerce. *Oregon Intrastate Freight Rates and Charges*, 311 I.C.C. 777.

The protestants contend that the increased rates will not produce additional revenues, because of the diversion of traffic from the respondents' lines. The evidence, however, is not convincing that substantial traffic will be diverted. This is a judgment matter, and the opinion of the carriers' managers that a substantial increase in revenue will result is evidence of substantial value. *State Corp. Comm. of Kansas* v. *United States, supra.*

While the evidence is convincing that generally the intrastate rates increased under the ex parte increases will not exceed the level of the interstate rates increased under the same ex parte increases, our findings will be limited to

prevent requiring an increased intrastate rate level above the increased interstate rate level, with which it may appropriately be compared.

Ultimate findings and conclusions—We find that:

1. The conditions incident to the intrastate transportation of property in Arkansas are not more favorable than those incident to the interstate transportation of property from, to, or within Arkansas.

2. The amounts and percentages by which the interstate rates and charges for the transportation of property from, to, or within Arkansas were increased in Ex Parte Nos. 212 (304 I.C.C. 289) and 223 (311 I.C.C. 373), including the various supplemental proceedings referred to herein, are just and reasonable.

3. The present Arkansas intrastate rates and charges imposed by the authority of that State for the intrastate transportation of property in Arkansas are unduly low, and are not contributing their fair share to the revenues required by the respondents to enable them, under honest, economical, and efficient management, to provide adequate and efficient transportation service at the lowest cost consistent with the furnishing of such service, thereby accomplishing the purposes of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense. The burden thus cast upon interstate commerce is undue in and to the extent that those rates and charges are less than they would be on the bases herein approved; and these intrastate rates and charges cause, and in the future will cause, undue, unreasonable, and unjust discrimination against, and an undue burden on, interstate commerce.

4. The unlawfulness herein found to exist should be removed by permitting the application to the Arkansas rates and charges the same respective increases as are main-

tained by the respondents on like interstate traffic between points in Arkansas, and between points in Arkansas and points in adjoining States, as authorized in Ex Parte Nos. 212 and 223 (including supplemental reports); provided that increases may not be made in intrastate rates or charges which will result in levels higher than the level of interstate rates or charges on like traffic over the same line of railroad to, from, or within Arkansas.

5. The establishment of increases in the rates and charges as provided in finding 4 will not result in unreasonable rates or charges, or in rates or charges that are unreasonable in relation to interstate rates and charges.

6. The increased rates and charges as provided in finding 4 will increase by substantial amounts the revenues of the respondents, and will provide not more than a fair proportion of the respondents' total revenues.

The foregoing ultimate findings and conclusions are without prejudice to the right of the authorities of the State of Arkansas, or of any other interested party, to apply for modification thereof as to any individual intrastate rate or charge affected thereby, on the ground that such rate or charge is not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

An order effectuating the foregoing findings and conclusions will be entered, unless this Commission is notified by the Arkansas commission, within 30 days from the date of service of this report, that the increases required to remove the unlawfulness herein found to exist will be permitted to take effect.

COMMISSIONER FREAS, dissenting:

My views in intrastate proceedings beginning with *Missouri Intrastate Freight Rates and Charges*, 289 I.C.C. 733, 764, and *Mississppi Intrastate Freight Rates and Charges*, 291 I.C.C. 39, 65, has consistently been that the original and primary jurisdiction over intrastate rates rests with

the respective State commissions. Their determinations should not be disturbed by us unless there is overriding evidence that the intrastate rates are unlawful. The burden of proof is on the petitioning railroads to make a convincing case and this they have not done.

In determining that the Arkansas intrastate traffic is an undue burden on interstate commerce, the majority discounts the low operating ratios of 74.36, 68.77, and 64.65 percent for the years 1960, 1961, and 1962 reported by respondents to the State commission on both intrastate and interstate Arkansas traffic. Instead, it gives substantial weight to the system operating ratios and accepts the argument of the respondents that operating ratios based on Arkansas traffic are understated because 50 percent of the origin or destination terminal expenses are charged to operations in other States. Even if this is so, it is inconceivable to me that the Arkansas traffic has been shown to cause a burden on interstate traffic.

Insofar as transportation conditions are concerned, the majority relies in part on the fact that the shorter intrastate hauls are more expensive. Even if this is so, the corresponding revenues are likewise higher as demonstrated by the higher earnings. Likewise, the State's full-crew law that requires an extra switchman applies equally on interstate traffic moving through Arkansas.

Admittedly, the intrastate rates are lower but this difference does not establish a need for increased revenues without a corresponding showing that interstate shippers, not here represented, are being subjected to unjust discrimination.

I would not disturb the findings of the State commission on the record as made.

By the Commission, division 2.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX 1

Pertinent Portions of Report Recommended by Hearing Examiner William J. Kane

(Rates, charges, and increases are stated per 100 pounds, unless otherwise indicated.)

* * * * * * * * * * *

In its initial report [302 I.C.C. 665] of February 11, 1958, in Ex Parte 212, the Commission found, among other things, that a critical need existed for additional rail revenues sufficiently at least to offset increases in costs not previously considered by it in approving increases in the carriers' freight rates and charges. The report observed that the public interest, and that of the national defense, in a sound, adequate, and efficient transportation system, would be adversely affected unless the proposed increased interstate freight rates and charges, with certain exceptions noted therein, * * * were permitted to become effective as scheduled. Thereupon, the Commission permitted certain of the schedules proposing increases in freight rates and charges to become effective without suspension, subject to a refund provision and further investigation into the lawfulness of all of the proposed new and increased freight rates and charges, and the proposed reduction in free time at the ports. The approved increases averaged about 2.3 percent.

In its final report of September 9, 1958, in Ex Parte 212, (304 I.C.C. 289), the Commission, in permitting the continuance and establishment of the proposed new and increased interstate freight rates and charges, found, with certain expections,[9] that the rail carriers were in need of the additional revenue to be derived therefrom. Absent the additional revenues, the report observed that the rail-

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[9] The proposed increases found by the Commission to be unjust and unreasonable are set forth in appendix A to this report.

roads' earnings would be insufficient to enable them, under honest, economical, and efficient management to provide, in the public interest, adequate and efficient railway transportation service; that without such additional revenues, serious curtailment of maintenance programs and capital expenditures would be required, contrary to the public interest and the national transportation policy.

The Ex Parte No. 223 proceedings dealt with schedules filed on September 7, 1960, by substantially all of the class I railroads in the United States, and many railroads of other classifications, proposing to establish, effective October 24, 1960, subject to possible suspension and investigation, general increases in their line-haul rates on nearly all commodities, and in their charges for certain other services. The proposals included an increase in the minimum charge for less carload shipments of $4 per shipment, and reduction in the free time for holding freight cars at the port to a maximum of 5 days.

A petition concurrently filed by the railroads with their schedules requested relief from outstanding orders of the Commission in various cases, from section 4 of the Interstate Commerce Act, and all other relief necessary to permit their schedules to go into effect without suspension, subject, however, to a refund provision should no increase, or a lesser increase than proposed, be allowed. The proposal provided that where the then present line-haul rates published in cents per 100 pounds did not exceed 65 cents, the increase proposed thereon was one-half (½) cent; on all line-haul rates higher than 65 cents per 100 pounds, the proposed increase was 1 cent per 100 pounds. Comparable increases were proposed on commodities where rates were named in amounts per ton or per car. Varying increases in line-haul rates on a limited number of commodities, such as coal, lignite, ores, and various kinds of wood, were also proposed. The proposed schedules also named increases on trailer-on-flatcar ship-

ments, and for special services such as loading and unloading freight, transferring freight to other cars, in-transit services, and car reconsignment or diversion services. The overall average increase was approximately 1.7 percent.

The railroads' main objective in filing the proposed schedules in Ex Parte 223 was to provide increased revenues needed to meet increased expenses due, principally, to higher wages and prices of materials, which had not been covered by the prior general rate increases. The increases in expenses of all the class I railroads in the United States since the Ex Parte No. 212 proceedings, were estimated as $607.7 million, or $460.9 million more than the estimated increases in revenues on an annual basis of $146.8 million for all class I railroads anticipated from both interstate and intrastate traffic under the proposed increases in the freight rates based on the constructive year 1960.

In permitting most of the proposed increases in Ex Parte No. 223 to go into effect as scheduled, subject to a refund provision and other remedial provisions of the act, the Commission concluded that the additional revenues to accrue therefrom were needed by the railroads to offset in part the increased costs not theretofore considered by it in approving the carriers' rates and charges; that without the additional revenue to be derived from the proposed increased freight rates and charges, the rail carriers' earnings would not be sufficient to enable them under honest, economical, and efficient management, to provide, in the public interest, adequate and efficient railway transportation service, and that curtailment of maintenance programs and capital expenditures would be required, contrary to the public interest. In the few instances where the schedules were suspended[10] in whole or in part, separate investiga-

[10] The proposals suspended in whole or in part, together with the ultimate determinations as to the lawfulness thereof in the several subsequent investigations, are set forth in appendix B to this report.

tions were subsequently instituted to determine the lawfulness thereof.

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The respondent Arkansas class I railroads contend in the instant proceeding that the Arkansas commission's failure to authorize the Ex Parte 212 and 223 increases on intrastate commerce in that State deprived them of approximately $1,113,759 in annual revenues. These particular carriers[14] and the miles of roads operated by each in Arkansas, are shown in footnote 14.

Respondent's Need for Additional Revenue

The respondents point out that the Ex Parte 212 increase was based upon the finding that the increase in the Nation's rail carriers' operating expenses amounted to $212.9 million annually, while proposed increases in freight rates and charges on interstate and intrastate traffic would yield estimated annual revenues of $194.3 million. Notwithstanding the additional revenues to be derived from the sought increases herein, the railroads assert that their freight operating expenses would still exceed the anticipated revenues by approximately $18.6 million.

The increase authorized in Ex Parte 223 was based upon a similar finding that the railroads' freight operating expenses since Ex Parte No. 212 had increased to $607.7 million annually, while the proposed increase in freight rates and charges, applicable on both interstate and intrastate traffic, would yield an estimated $146.8 million. In this situation also, the railroads' expenses for freight operations, respondents state, would still exceed the estimated revenues to be derived from the increases by approximately $406.9 million.

A rail witness testified that the Arkansas class I railroads have experienced substantial increases in wages,

[14] Mo. Pac. (1,743 miles); Rock Island (598 miles); Cotton Belt (570 miles); Frisco (533 miles), and KCS-L&A (290 miles).

payroll taxes, materials and supplies, ad valorem taxes, and other items of expense, since the termination of World War II. The Arkansas rail lines, this witness stated, did not rely solely on increased freight rates and charges granted in the general ex parte proceedings to meet inflationary costs; instead, drastic measures were taken in an effort to bring about reductions in their operating costs. Included in these measures were reductions in labor forces, conversion from steam power to complete dieselization, improvement in accounting methods by use of electronic accounting systems, revamping terminal facilities for more efficiency, improvement of yard installation and modern electronic yards, reduction in maintenance gangs by use of modern track laying machinery, and improvement generally in the operating performance factors. Despite these improvements in operating efficiency and the increases in revenues resulting from the several ex parte rate proceedings, the rail costs of the carriers have continued to climb at a faster pace than revenues, the net result being lower earnings for these carriers.

Wages represent approximately 60 percent of the railroads' total operating expenses; materials and supplies 30 percent, and 10 percent for depreciation, personal injuries, and other general expenses. From November 1, 1956, to and including July 1, 1960, 10 separate wage increases were granted operating and nonoperating railroad employees, totaling 48.5 cents per hour, representing 23.62 percent. Notwithstanding the decline in the average number of employees of class I railroads operating in Arkansas from 88,860 in 1952, to 55,998 in 1960, or 37 percent, the hourly rate of pay of these employees increased from $1.786 in 1952, to $2.549 in 1960, or 42.7 percent. Because of the substantial wage increases, total payroll of the Arkansas class I railroads was reduced by only 6 percent during that period, despite the fact that there were 32,862 less employees, 1960 compared with 1952. The hourly wage

rate in 1962 was $2.678, the number of employees of the Arkansas class I railroads in that year averaging 49,634.

Costs of materials and supplies, including fuel, 1952 to 1960, increased almost 23 percent.

The combined net investment of the Arkansas class I railroads in system property used for transportation services, increased by $103,000,000 during the 9-year period 1952-1960. The increase in 4 of these years, 1957-1960, was approximately $37 million. In spite of these expenditures towards improvement in transportation services and reductions in overall operating costs, the rate of return experienced by these Arkansas class I railroads during these two periods decreased from 5.38 percent in 1952 to 4.07 percent in 1957, and 3.37 percent in 1960. A rate of return of 4.47 percent in the southwestern region (which includes Arkansas), respondents point out, was considered substandard and inadequate by the Interstate Commerce Commission in Ex Parte No. 175, Increased Freight Rates, 1951, 284 I.C.C. 589, 612.

The operating ratios of the Arkansas class I railroads increased from 86.99 percent in 1952 to 89.16 percent in 1957, reaching an all-time high of 90.76 percent in 1960. Total operating revenues of these carriers declined from $773,392,904 in 1956, to $759,588,618 in 1960, while their total operating expenses increased from $570,705,690 in 1956 to $576,252,759 in 1960. Their net railway operating income dropped from $98,170,731 in 1956, to $70,185,669 in 1960, the net income during the same period declining, respectively, from $65,556,005 to $40,768,482. Thus, respondents point out that their operating expenses, including taxes and rents, related to total operating revenues in 1960, increased in greater proportion than in any previous years. The total operating ratios of these railroads for the years 1961 and 1962, were 90.29 and 89.29 percent, respectively.

Indicative of their efforts towards increasing freight train efficiency and thus minimizing operating costs, the

average train speed per hour between terminals increased from 19.48 miles in 1952 to 21.23 miles in 1960; freight ton-miles per train hour during the same period, increased by 15,440 gross ton-miles, and net ton-miles per train hour by 6,929 tons.

Tax payments to the State of Arkansas made by the Arkansas railroads were 33 percent more in 1960 than in 1946, notwithstanding the reduction of 452 miles of road owned and operated by them in that State, 1946 to 1960. Additional expenditures made by these carriers include private mile allowances and cost of new equipment. For example, the price of a boxcar in 1946 averaged $3,726, compared with $10,960 in 1960, reflecting an increase, 1960 over 1946, of 194 percent. The purchase price of gondola and hopper cars in 1946 averaged $3,282 each, compared with $10,601 per unit in 1960, an increase of 223 percent, 1960 over 1946.

Another item mentioned by these carriers which has substantially increased their cost of doing business is payroll taxes. Based on a maximum taxable income per employee per month, the payroll tax rate, 1952 to June 1959, increased 61.5 percent, or an increase of 33 percent during that period.

Respondents assert that the operating costs of handling Arkansas intrastate traffic are higher than interstate traffic moving to, from, or through, that State due to the Arkansas Full Crew Law.[15]

Notwithstanding the increases from general proceedings, respondents contend that traffic has remained constant, indicating that such increases have had very little effect in causing diversion away from the railroads. For example, the class I Arkansas roads carried a total of 174,347,714

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[15] The Arkansas Full Crew Law requires that a third switchman be used on all yard crews moving trains over public crossings, and a third trainman on all freight trains handling more than 24 cars.

tons of system traffic in 1946, compared with 166,128,127 tons in 1960, the latter tonnage reflecting 95.29 percent of the former. These tonnages produced gross freight revenues of $490,345,363 in 1946, and $705,231,498 in 1960, or an increase, 1960 over 1946, of almost 44 percent. System freight hauled by these carriers in 1962 totaled 170,953,550 tons, producing gross revenues of $704,598,383. System traffic handled by these same carriers to, from, through, and within Arkansas totaled 48,308,307 tons in 1946, and 51,681,599 tons in 1960, an increase of almost 7 percent, 1960 over 1946. The net freight revenue from this traffic in 1946 amounted to $80,929,983 and $120,764,155 in 1960, or an increase, 1960 over 1946, of 49 percent. Using the Cotton Belt as representative, for example, this carrier in 1959, when the Ex Parte 206 increase was in effect, handled 21,917 carloads of Arkansas intrastate traffic, compared with 20,480 carloads in 1957 (which was prior to Ex Parte 206), or an increase, 1959 over 1957, of 7 percent. The tons represented by these carloads totaled 1,258,544 in 1959, and 1,046,445 in 1957, an increase, 1959 over 1957, of 20 percent. Revenues from the 1959 traffic amounted to $1,668,615, compared to $1,414,660 from the 1957 traffic, an increase of 18 percent, 1959 over 1957. In 1958, this respondent handled 21,158 cars of Arkansas intrastate traffic, representing 1,198,047 tons and gross revenues of $1,467,763.

• • • • • • • • • • • • • • • The assistant controller of the Mo. Pac. testified that Arkansas was an important segment of this railroad's system operations, pointing out that the 1,743 miles of road operated by this carrier in that State represented 18.5 percent of its total 9,406 system miles. Revenue from intrastate freight movements handled by the Mo. Pac. in that State in 1960 amounted to $4,938,518, or 8.3 percent of the total freight revenues earned by this carrier in that State in 1960. Current net earnings, this witness testified, are inadequate to meet rising costs and provide sufficient

funds to maintain road and equipment in a satisfactory manner.

During the 5-year period 1956-1960, the rate of return of this carrier fell from 4.52 percent in 1956, based on a valuation of $755,207,701, to 3.86 percent in 1960, based on a valuation of $796,437,966. Among the principal items cited by this witness contributing to the decrease in this carrier's operating ratio, are the increases in labor and material costs, insurance, loss and damage of freight, personal injuries and damages. For example, during this period, per hourly straight time wage rates increased from $2.06 in 1956 to $2.56 in 1960, or 24.3 percent; average annual compensation per employee increased $1,313, or 26.6 percent; average fringe benefits increased from $398 to $632, or 58.8 percent. Thus, total increases in expenses per employee during this period amounted to $1,547. Increases in costs of materials and supplies have added an additional $1,200,000 per year to this carrier's costs of operation. The increase in costs of items other than for labor and materials exceeded $3 million, 1960 over 1956. These additional expenditures, the witness states, have affected Mo. Pac.'s freight train operations by increasing its average costs per freight train mile from $2.239 in 1956 to $2.798 in 1960, or 25 percent; its per thousand gross ton-miles, same period, from $0.718 cents to $0.832 cents, or 15.9 percent, and its per yard engine hour from $15.19 to $17.61, or 15.9 percent.

Acquistion of specialized equipment to meet shipper demands has also added to the unit cost of Mo. Pac.'s freight cars. For example, a 50′ 60″ boxcar with "DF" fittings in 1956 cost $12,138, and $14,095 in 1960; cost of covered hopper cars increased from $7,194 in 1956 to $9,369 in 1960, the larger sized covered hopper capacity car costing up to $15,844. The cost of covered hopper cars used for handling commodities such as flour, sugar, et cetera, equipped with air slide attachments, increased from $8,351 to $13,277, 1960 over 1956. During this 5-year period, the Mo. Pac.

expended $162 million for capital expenditures, $97 million of this amount being spent for equipment. More than $1 million of this capital expenditure was spent in Arkansas for transportation purposes, including, among other items, yard expansions, diesel facilities, bridge improvements, automatic retarder for classification yard, and a centralized traffic control. Indicative of its intent to continue to improve its operating efficiency, the witness states that the average number of cars per freight train in 1960 increased 4.8 percent over 1956; average net tons per freight train mile increased by 9.5 percent over 1956, and gross ton-miles per freight train hour increased by 7.9 percent. The number of employees of this carrier decreased from a total of 29,761 in 1956, to 22,214 in 1960, or 25.4 percent.

Unless the increases sought herein are granted, respondents point out that intrastate traffic handled by them will be limited to the Ex Parte 206 increases which the Arkansas Commission permitted thereon about October 23, 1958. In these circumstances, some of the Arkansas shippers will also be affected by the disparity in rates. For example, soybean meal shipped from Arkansas origins to interstate destinations, and in the reverse direction, would move under rates subject to the Ex Parte 212 and 223 increases, while those moving solely within Arkansas would have the advantage of the present intrastate rates not subject to these ex parte increases. The intrastate carload rates on this commodity from Stuttgart, Ark., to five representative points in that State range from 16 to 27 cents, minimum 40,000 pounds, and 14 to 24 cents, minimum 60,000 pounds. The interstate carload rates, on the other hand, from Stuttgart to eight destinations in Mississippi, Louisiana, Missouri, and Texas, range from 22 to 39.5 cents, minimum 40,000 pounds, and 17 to 35.5 cents, minimum 60,000 pounds.

Another situation urged by respondents tending to disrupt the rate relationship, absent application of the sought increases, involves rates between points in Arkansas on

shipments moving via interstate routes. The record indicates that supplements to various tariffs authorizing the Ex Parte 212 and 223 increases, contain an exception that if rates via such interstate routes are equalized with rates via intrastate routes, the ex parte increases do not apply on the interstate traffic. If, however, the rates via both routes are not the same, the increases do not apply over the interstate routes. Another problem advanced by these carriers is the disparity between intrastate and interstate class rates, the former being on a lower basis in Arkansas on intrastate traffic, while the latter are subject to the ex parte increases.

Respondents claim that the cost of handling intrastate traffic within Arkansas is more burdensame than interstate traffic to, from, or through that State. The causes producing this result in Arkansas, the assistant to vice-president-operation of the Mo. Pac. testified, include the shorter hauls; the higher percentage of moving intrastate traffic in local freight trains than interstate traffic; higher scale of wages of local freight train and engine crews than similar crews on through freight trains; heavy overtime payments in operating local freight trains; higher fuel costs, and the aforementioned Arkansas' Full Crew Law. According to this witness, Arkansas intrastate traffic absorbs higher car detention time and freight car-hire and ownership costs, in relation to transit time and revenues, than longer hauls on interstate traffic.

* * * * * * * * * *

Protestant Ideal Cement Company is engaged in the manufacture and sale of cement, whose mills and distribution terminals are located in various States from Tampa, Fla., to California, Oregon, and Washington. Cement is shipped both intrastate and interstate. This company owns and operates a mill at Okay Junction, Ark., local on the Graysonia, Nashville and Ashdown Railroad 11 miles south of Nashville, Ark., and 16 miles north of Ashdown, Ark.

The interest of this protestant is confined to the level of the Arkansas intrastate rates on cement and gypsum rock from Highland, Ark., to Okay Junction.

The witness compares the 1960 operating ratio of the Mo. Pac. of 76.74 percent with the ratio of 90.76 percent for class I railroads serving Arkansas during the same year, and observes that some of the class I carriers are less efficient than the Mo. Pac. As is apparent from the exhibits reflecting these ratios, the 90.76 percent represents the total operating ratio, including total operating expenses, taxes, and net rents. The 76.74 percent ratio includes only the total operating expenses, and excludes total taxes and total net rents. The evidence shows that Mo. Pac.'s 1960 total operating ratio, including taxes and rents, is 89.59 percent, compared with the 90.76 percent for all of the Arkansas class I railroads for that year.

Referring to the increase in the respondents' hourly rate of pay paid to Arkansas employees of 42.72 percent, 1960 versus 1952, and the decrease of only 6 percent in the respondents' payroll, the witness states that a more meaningful comparison would be an index number based on the total compensation rather than the hourly wage rate. Respondents point out that had the number of employees not been reduced by 37 percent, 1952 to 1960, the increases in freight rates in the Ex Parte 212 and 223 proceedings would have been substantially higher.

The increase sought herein on the cement rates is ½ cent cwt. granted in Ex Parte 223, no increase having been authorized on this commodity in Ex Parte 212. Although no figures were submitted showing the rail tonnages of cement shipped by this company in any particular period, the witness states that the proposed increase would result in additional freight charges to his company in excess of $2,000 annually, "assuming this company ships cement tonnage comparable to 1963."

An exhibit was submitted by protestant for the purpose of showing the decline in cement rates within southwestern territory. The rates shown thereon, based on distances ranging from 5 to 290 miles, show that prior to August 1959, they ranged from 8.50 cents to 35 cents per cwt.; effective August 1959 and March 1960, from 5.75 to 26 cents. Those effective June 1963, from 6.25 to 21.5 cents based on these same mileages. The exhibit indicates that a tariff allowance of 35 cents per net ton is accorded for unloading bulk cement.

In his verified reply statement, the respondents' witness states that the August 1959 rates apply on interstate traffic and intrastate traffic in Arkansas, Missouri, New Mexico, and Oklahoma, subject to 60,000 pounds in noncovered hopper cars, and 100,000 pounds in closed hopper cars. The interstate rates are subject to Ex Parte 223 increase. The scale reflecting these rates also publishes point-to-point rates from producting points to destinations within 200 miles. The March 1960 reduced rates also apply on interstate traffic, subject to Ex Parte 223 increase, and on intrastate traffic in the same four States just mentioned. These rates apply only up to and including 170 miles, the August 1959 rates being applicable beyond. The same minimum weights as the 1959 rates apply on these rates. The June 1963 rates apply on interstate traffic of the four abovementioned States, and were published as not being subject to the Ex Parte 223 increase. These particular rates are not involved herein. These rates are subject to a minimum weight of 150,000 pounds. Since the unloading allowance of 1.75 cents per cwt. expired on January 24, 1965, insofar as these rates are concerned, it is now inapplicable.

The rates on which respondents seek to apply the increase herein are those which became effective in March 1960, which, as indicated, range from 5.75 cents for 5 miles to 26 cents for 290 miles. At the time these rates were reduced, up to 170 miles, to meet truck competition, the mini-

mum weight was increased from 100,000 pounds to marked capacity of the car, but not less than 100,000 pounds. The June 1963 adjustment was made subject to 150,000 pounds.

From Highland to Okay Junction, this company ships a total of 15,000 tons of gypsum rock annually, based on the present rail rate of 10 cents per cwt., which would become 11 cents under the increases sought herein. The witness states the increase would result in additional freight charges to his company of $3,000 per year. The highway distance Highland to Okay Junction is 26 miles. In the opinion of this witness, the present rate, based on a minimum truckload of 20 tons, producing round trip truck-mile earnings of 77 cents, would be attractive to motor carriers. In his rebuttal verified statement, the respondents' witness refers to the Commission's Statement 3-60 (Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities), Southwest Region, 1959, and computes an out-of-pocket motor carrier cost in that region of 18 cents cwt., which he compares with the present and proposed rail rates of 10 and 11 cents, respectively. It appears that the 18 cents arrived at by respondents' witness is in error. Computed on the basis of the 40,000 pounds shown in table II, page 40, of this statement, the single-line cost for distances 20 to 30 miles would be between 14 and 15 cents. Computed on the basis of the unit costs rather than the costs scales, the total cost per hundredweight for 26 miles, based on 40,000 pounds, is 12.1 cents, i.e., a line-haul cost of 3.8 cents (table 1, line 3), with no return load, a terminal cost of 8.2 cents (table 2), and a billing and collecting cost of 1 cent. This computation assumes no platform handling cost and that the carrier will perform both pickup and delivery.

In the opinion of protestant's witness, the proposed increases would result in the diversion of this company's traffic from the railroads to motor carriers. The respondents point out that Foreman and Okay Junction are located

in the extreme southwestern part of Arkansas, and since the average haul of other industries in Arkansas may be somewhat longer, this traffic is less susceptible to truck competition.

Protestant Arkansas Cement Corporation, a subsidiary of Arkansas Louisiana Gas Company, operates a cement plant at Foreman, Ark., local on the Frisco Railroad. The cement manufactured at this plant is distributed to points in Arkansas and surrounding States. This company competes with cement mills and distribution terminals located at various points in the States of Oklahoma, Kansas, Missouri, Tennessee, Mississippi, Louisiana, and Texas. Its interest herein is confined to the proposed increase on the Arkansas intrastate cement rates.

Boxcars placed for loading and unloading by the rail carrier on its tracks are switched by it to this plant and returned for pickup on its own lead track.

Comparisons are made by this witness between an average intrastate haul of 294.94 miles per boxcar on cement moved from this plant in 1963, and the 60 short-line miles for all freight traffic handled in the western district for the year 1962, shown in the Commission's Statement 2-64 (Rail Carload Cost Scales By Territories For The Year 1962). As noted therein (page 5), however, the compared short-line mileage shown for that district is based on average way train movements which, as pointed out by respondents' witness, are unrelated to the total average movements in both through and way trains. There is, of course, a difference between the two types of trains.[19]

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[19] Way freight trains are operated primarily to gather and distribute cars in road service and move them between way stations and concentration and distribution points, terminals or tieup points, junctions or other way stations. Through freight trains are operated primarily to move cars in road service between two or more concentration or distribution points, terminals, or tieup points or junctions.

Based on the total boxcar shipments of cement handled for this company in 1963, the witness asserts that the proposed increase would result in additional freight charges slightly in excess of $7,000 per year. The record does not show the number of boxcar shipments moved by this protestant during that year. The respondents claim that cement companies have been utilizing the 150,000 pound rates to the extent possible since their effectiveness on June 24, 1963. In his rebuttal statement, the respondents' witness states that a check made by him of the shipments moved by this company during the 3-month period July, August, and September, 1963, shows that it moved a total of 617 cars weighing more than 150,000 pounds, and 115 cars weighing less than 150,000 pounds per car. Based on these 115 car movements, he computes that the sought increase of ½ cent per cwt. would amount to $862.50 for the 3-month period, or a total of approximately $3,450 per year. In the opinion of this protestant's witness, the sought increase will divert part of this company's present tonnage to motor carriers.

Arkansas Rice Growers Cooperative (Arkansas Rice) and Arkansas Grain Corporation (Arkansas Grain), filed a joint verified statement in opposition to the sought increases on rough rice, soybeans, and soybean meal. Both protestants are organizations controlled by their farmer members.

Arkansas Rice Growers is engaged in processing and distributing milled rice and rice products in Arkansas and other States in competition with rice mills in Louisiana, Texas, California, and Tennessee. It operates three rice mills at Stuttgart, Ark., served by the Cotton Belt and Rock Island, and one at Jonesboro, Ark., served by the Cotton Belt and Frisco. Its interest herein relates to application of the Ex Parte 223 increase on Arkansas cutback rates on rough rice.

Arkansas Grain is engaged in processing and distributing soybean meal and oil in Arkansas and nearby States

in competition with exporters of raw soybeans in Illinois, Iowa, Kansas, Mississippi, Missouri, and Tennessee. It operates two soybean processing plants at Stuttgart, served by the Cotton Belt and Rock Island, and one at Helena, Ark., served by the Mo. Pac., and Illinois Central Railroad. Its interest herein is confined to Arkansas carload rates on soybeans and soybean meal.

Cutback rates are proportional or re-shipping rates limited to shipments of rough rice from numerous origins to milling points for milling and subsequent reshipment outbound of the milled rice and rice products. The outbond weight of these products must equal the inbound weight of the rough rice. In other words, cutback rates represent a portion of the combination through rate. Respondents seek to apply on these rates the increases authorized in Ex Parte 223. Protestant states that the Ex Parte 223 increases were not applied by the railroads on cutback rates on similar shipments of rough rice for competing mills in Louisiana, Texas, and Memphis, Tenn. Moreover, that the interstate cutback rates on rough rice published by the Cotton Belt, Rock Island, and Frisco, from Arkansas producing origins to Memphis, Tenn., are not subject to the Ex Parte 223 increases.

Arkansas Rice contends that an increase on these cutback rates would be in violation of rule 7 contained in Ex Parte 223. Rule 7 relates to combination rates and was made an integral part of the Ex Parte 223 proceedings. This rule provides, in substance, that where a rate shown in a tariff is composed of two or more factors, each such factor will be increased separately, and the increased rate will be the total of the factors so increased. Thus, protestant contends that an increase on the inbound and outbound rates would exceed the maximum increase allowed under that proceeding. Respondents claim that the situation respecting rough rice moving into a mill point based on the cut-back rates and the movement of the rice products

outbound based on local rates is different from the conditions contained in rule 7. They argue that the movements of rough rice into the mill and the subsequent movement of rice products outbound are separate and distinct movements.

In its report in Ex Parte 223, the Commission, commenting on rule 7, stated at pages 410 and 411:

> No reasons have been advanced as to why shippers using combination rates should bear a greater burden than those having the use of single-factor rates. * * * It appears that the proposed schedules, insofar as they would result in increases on combination rates greater in amount than the increase which would result if such rates were published as single-factor rates, would be unreasonable, and the rule will be suspended. Pending investigation, the carriers should establish a rule to provide a single increase on combination rates * * *.

In its subsequent decision, *Increased Freight Rates, 1960, Rule (7)*, 313 I.C.C. 471 (April 11, 1961), the Commission found the proposed combination rule was unjust and unreasonable. Quoting from *Combination Rates, General Increases, 1946*, 273 I.C.C. 575, wherein a similar combination rule was proposed, the Commission said:

> It may be that some rates which have been depressed by truck or other competition can and should be increased as contemplated under the proposed rule without transgressing the law, but a general rule such as the one under consideration is an unjust and impractical method of accomplishing that end.

The Commission having concluded, therefore, that a general rule, as here, was an impracticable method of increasing combination rates, the examiner finds that the Ex Parte 223 increase, as such, cannot be applied on the cutback intrastate combination rates on rough rice moving inbound

and rice products moving outbound. This is not to say, however, that carriers may not file supplements under section 6 of the act increasing their basic rates, which, of course, would be subject to protest and possible suspension.

Arkansas Grain compares the lower interstate car mile earnings, averaging 32.4 cents, on export shipments of soybeans based on the truck-barge competitive scale of rates from three representative origins in Arkansas to New Orleans, La., on distances averaging 571.5 miles, with the higher intrastate car-mile earnings on distances up to 200 miles based on the standard mileage scale rates and the local mileage scale of rates up to 800 miles. The record does not show how many shipments, if any, move from the three Arkansas origins to New Orleans. Moreover, car-mile earnings, as indicated, are higher for shorter than longer distances.

It is pointed out by this protestant that the present carload intrastate rates on soybean meal, minimum 60,000 pounds, from Stuttgart to Bentonville and Fayetteville, Ark., are the same as the interstate rates, including Ex Parte 212 and 223 increases; and from Van Buren, Ark., to Hope, Nashville, and Texarkana, Ark., the intrastate rates are from 1 cent to 5 cents per 100 pounds higher than the current interstate rates, including these two ex parte increases. Protestant states that similar situations obtain respecting movements from and to other intrastate points. Thus, it is contended that these intrastate rates would be higher than the interstate rates if the sought increases were applied thereon. The record indicates that this anomalous situation resulted from an error in publishing the 28300 basis of rates. The present rates on soybean meal are based on 28300 distances and groupings, the intrastate rates on short-line mileages. However, through inadvertence, the Arkansas soybean meal rates were not changed at the time the 28300 bases were applied on the Arkansas class rates. Respondents assert that this

error is now being corrected so that the intrastate rates will be placed on the same 28300 basis.

Lumber: A verified statement on behalf of nine[20] lumber companies was filed by the Martin Traffic Service opposing the sought increases in the intrastate rates on rough or dressed lumber. This protestant adopts the statements and arguments of other protestants and the Arkansas commission insofar as the principal issue in this proceeding is concerned.

The record indicates that the present rates on lumber and related articles are based on the 28300 scales, the interstate rates being subject to ex parte increases. Incentive rates, subject to various minima weights, are published to attract heavier car loadings. Protestant points out that the intrastate incentive rates from West Memphis, Ark., to Fort Smith, Ark., are higher than the incentive interstate rates from this origin to St. Louis, Mo., based on practically the same distance of 292 miles. For example, it shows that the rate of 23.6 cents per cwt., 120,000 pounds, produces car revenue of $283.20, or 97.0 cents per car-mile, which is $40.80 per car and 14.3 cents per car-mile higher than the interstate rate of 20.2 cents, same minimum, which produces per car revenue of $242.20, or 82.7 cents per car-mile, from and to these two points. The respondents point out in their rebuttal statement that while the interstate rates include all ex parte increases, the only exception is on the rates published from and to West Memphis, which point takes the Memphis, Tenn., rates. There is no showing in this record the extent of lumber shipments moving between West Memphis and Fort Smith.

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[20] Industrial Lumber Company, W. R. Wrape Stave Company, Dixie Lumber & Moulding Co., J. H. Hamlen & Sons, Inc., J. W. Black Lumber Co., Searcy Flooring & Lumber Co., J. L. Williams & Sons, Inc., Farrell-Cooper Lumber Co., and Ozark Lumber Industries, Inc.

Certain comparisons are made by protestant to show that the Arkansas intrastate rates on rough lumber for further manufacture and reshipping are too high when compared with the rates on rough lumber. For example, one of protestant's exhibits shows rough lumber rates from 12 to 25 cents cwt., minimum 34,000 pounds, for distances 60 to 240 miles, and the higher rates of 12.5 to 25.5 cents, minimum 40,000 pounds, same distances, on rough lumber for further manufacture and reshipment. The respondents state that prior to establishing lumber rates based on the 28300 scale basis, rough material rates were lower than lumber rates, but that such is not the case at the present time.

The Little Rock Chamber of Commerce, whose verified statement was filed on behalf of its shipper members and the Highway Department of Arkansas, relies generally on the prior records, including the findings and orders therein, presented before the Arkansas commission for its position that the present level of intrastate rates does not place a burden on interstate commerce. • • •

As indicated, the Arkansas commission filed a brief in lieu of a verified statement. It argues that the present Arkansas intrastate freight rates and charges imposed by authority of that State are not abnormally low and are contributing their fair share of the revenues required by respondents to enable them to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and, therefore, cause no undue, unreasonable or unjust discrimination against or undue burden on interstate commerce.

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The respondents, as noted, also seek as a counterpart of Ex Parte 223, a minimum line-haul charge of $40 per car within Arkansas. As justification for their proposal, they show that the average switching costs alone exceed the $40 per car. Respondents' cost data, based on State-

ment No. 3-61 for the year 1960, show that the western district terminal cost of switching a boxcar averaged $63.26; gondola, hopper, flat, and stock cars, $67.24; and refrigerator and tank cars, $52.69. The cost for the line-haul movement of a car should be added to the terminal charge for the total cost that is to be covered by the $40 minimum line-haul charge per car.

The respondents' evidence establishes that the out-of-pocket costs exceed the $40 per car minimum line-haul charge sought. Minimum charges per car are an essential part of the respondents' efforts to meet increased costs. The examiner finds on this record that the minimum line-haul charge of $40 is not unreasonable.

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APPENDIX A

Ex Parte No. 212

Increases on interstate freight rates and charges proposed by the railroads on the following commodities and services in Ex Parte No. 212, 304 I.C.C. 289, found unjust and unreasonable by the Commission to the extent indicated:

Animals and products category:

On edible livestock, proposed increase of 3 percent, minimum 5 cents per 100 pounds, to extent it exceeds 3 percent, without minimum.

On shells, oyster, clam, or mussel, proposed increase of 3 percent to extent it exceeds 3 percent, maximum 12 cents per net ton.

On wool and mohair, as described in groups 235* and 237*, the proposed increase of 5 cents per 100 pounds, in its entirety.

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* Groups 235 and 237 refer to the commodity groups listed in Freight Commodity Statistics Classification under Animals and Products.

On edible tallow, proposed increase of 3 percent to extent it exceeds 1 cent per 100 pounds.

Manufacturers and miscellaneous category:

On clay farm draintile, proposed increase of 5 cents per 100 pounds, or $1 per ton, to extent it exceeds 2 cents per 100 pounds.

On fly ash, proposed increase of 3 percent, maximum $1 per net ton, to extent it exceeds 3 percent, maximum 20 cents per net ton.

On pig iron and scrap iron and steel, proposed increase of 2 cents per 100 pounds, or 40 cents per net or gross ton, as rated, to extent it exceeds 3 percent, maximum 40 cents per net or gross ton, as rated.

On scrap paper and rags and related articles described under group 655, the proposed increase of 3 percent, maximum 3 cents per 100 pounds, in its entirety.

Special and accessorial charges:

The proposed increase of 20 percent in switching charges under item 170 (a)** to extent it exceeds 5 percent.

The proposed varying increases in Diversion and Reconsignment Charges, where such charges have heretofore existed, to extent such increases exceed 10 percent.

The proposed increases to $20 per car in charges for stopoff for partial unloading or to complete loading, under item 150, to extent they exceed 10 percent.

** This has reference to paragraph (a) of item 170 of Tariff X-212.

Free Time at the Ports

The proposed reduction in free time at the ports to 4 days found not just and reasonable without prejudice to filing new schedules reducing free time where respondents can affirmatively show current free time exceeds that reasonably required.

APPENDIX B

Ex Parte No. 223

Schedules reflecting proposed increases in freight rates and charges on the following commodities and other matters in the main report in Ex Parte No. 223 proceedings, 311 I.C.C. 373, (October 20, 1960), suspended or made subject to investigation, together with final disposition thereof in subsequent Ex Parte 223 investigation proceedings:

I. Products of Agriculture

Fresh fruits and vegetables:

Respondents' proposal where rates are published in amounts per car should be made subject to a maximum increase of $2 per car.

[Proposed increase found lawful in a subsequent Ex Parte 223 (Sub-No. 9) proceeding in 313 I.C.C. 519.]

III. Products of Mines

Coal:

Railroads were proposing to increase the lake cargo, tidewater, and river transshipping rates by 7 cents, same amount as the all-rail rates with a few exceptions. The Commission in certain of the past general increase proceedings, it was pointed out, limited rail increases on lake cargo, tidewater, and river transshipping rates to approximately one-half the all-rail increases, and concluded it was desirable to determine whether similar treatment

was proper in this proceeding. Consequently, it was concluded that the proposed increases on coal be investigated.

[Proposed increase in line-haul rates on coal and handling charges on coal and coke found just and reasonable in a subsequent Ex Parte 223 (Sub-No. 5) proceeding in 316 I.C.C. 159.]

Petroleum coke:

The Commission found increase on petroleum coke should be no higher than the increase on bituminous coal. The schedules insofar as they pertained to petroleum coke were suspended without prejudice to filing of new increases thereon in the amount of 7 cents per net ton.

[Proposed higher rail increase on petroleum coke found not shown to be just and reasonable in Ex Parte 223 (Sub-No. 5), supra.]

Iron ore:

Since iron ore moving to upper lake ports for transshipment by water was excluded from proposed increases because of foreign competition, the Commission concluded a further investigation was warranted.

[Proposed increases of 10 cents a net ton or 11 cents a gross ton on iron ore found just and reasonable in a subsequent Ex Parte 223 (Sub No. 3) proceeding in 313 I.C.C. 549 (April 20, 1961).]

Pulpboard:

Proposed line-haul increases on pulpboard, insofar as they would apply on certain rail rates from St. Marys, Ga., to Savannah, Ga., and from Edgewater, N. J., to certain points in New Jersey and New York, which were factors in connection with rail-water-rail movements from St. Marys to the New Jersey-New York destination, suspended for investigation before being permitted to become effective.

[Schedules voluntarily canceled by respondents, effective May 5, 1961, pursuant to Special Permission Order 90135.]

VI. Minimum Charges

Minimum charge per car (item 145-A(b):

Minimum per car charge on traffic from, to, or within eastern territory would be increased to $60. On all other carload traffic in the other territories, minimum charge would be $40 per car. Schedules of increases of minimum per car charges suspended subject to further investigation.

[Proposed minimum per car charges found just and reasonable in a subsequent Ex Parte 223 (Sub. No. 1) proceeding, 313 I.C.C. 563 (April 24, 1961).]

VIII. Rules

Rule 7, combination rates:

Since the tariff names specific increases, the effect of proposed rule 7 would be to provide increases on combination (multiple-factor) rates which, in many instances, would be two or more times greater than the increases proposed in single-factor rates. The Commission found the proposed schedules, insofar as they resulted in increases on combination rates greater than they would if such rates were published as single-factor rates, would be unreasonable. Rule suspended. Pending investigation, carriers were to establish a rule to provide a single increase on combination rates on 1 day's notice.

[Combination rule 7 found not shown to be just and reasonable in a subsequent Ex Parte 223 (Sub-No. 10) proceeding, 313 I.C.C. 471 (April 11, 1961).]

Special and Accessorial Charges

II. Switching (items 165-C)

The proposed increases, $3 per car for intraplant movements and $7.50 per car for intraterminal and interterminal movements, would apply only to carload freight loaded at and moving from one track location to another within the

same switching district where freight unloaded. It was concluded not to suspend, but to investigate.

[Subsequently, in 315 I.C.C. 199, Ex Parte 223 (Sub-No. 2), (November 22, 1961), the Commission found proposed increases not shown to be just and reasonable, and ordered schedules canceled; that a just and reasonable increase would be 20 percent over the prior charges, not to exceed $7.50 in eastern district, $5 in western district, and $3.75 in southern and Pocahontas regions. Thus, increases Item 165 found not shown to be just and reasonable, without prejudice to establishment of charges in accordance with the conclusions set forth in the Commission's Sub. No. 2 report.]

[On reconsideration 318 I.C.C. 485 (October 25, 1962), Ex Parte 223 (Sub. No. 2), the Commission concluded maximum increase for intraplant switching charges should be 20 percent over prior charges, but not to exceed $3 in the eastern district, $2 in the western district, and $1.50 in the southern and Pocahontas regions. The increased switching charge of $3 per car for intraplant movement was found not shown to be just and reasonable, without prejudice to establishment of intraplant switching charges in acordance with the Commission's conclusions therein.]

[That portion of the order of November 22, 1961, supra, requiring cancellation of the flat $7.50 charge for intraterminal and interterminal movements, in the meantime, was set aside by the court in *Pennsylvania R. Co.* v. *United States*, 216 F. Supp. 199 (April 15, 1963). The Commission vacated its prior orders to the extent they required the eastern district rail carriers to cancel the $7.50 increase on charges for intraterminal and interterminal switching, and the $3 increase in charges for intraplant switching. On further consideration, 3221 I.C.C. 560, Ex Parte 223 (Sub-No. 2) (May 4, 1964), the Commission found increases of $7.50 and of $3 not unjst and unreasonable. Prior findings modified accordingly.]

Charge for third transit (individual tariffs):

The grain industry vigorously opposed imposition of the charge of 5 cents per 100 pounds for the third transit, which was then free of charge. Schedules suspended.

[Schedules voluntarily canceled by respondents effective between dates of February 1 and March 1, 1961, under authority of Special Permission orders Nos. 90190 and 90209.]

FREE TIME AT THE PORTS

It was proposed to reduce the various periods of free time for holding freight cars to a maximum of 5 days, exclusive of Saturdays, Sundays, and holidays, except when those days occurred after the first 5 days, at all ports in the United States, including Great Lakes ports.

Respondents' proposal in Ex Parte No. 212 to reduce free time at the ports to 4 days was suspended. The Commission therein found the 4-day free time period not shown to be just and reasonable, without prejudice to reducing free time at those ports where respondents could affirmatively show that the free time then (and now) in effect exceeded a reasonable period. While respondents in Ex Parte 223 proposed 5 days' instead of 4 days' free time, the Commission was not satisfied sufficient justification was provided therefor, and suspended said schedules for investigation.

[Schedules voluntarily canceled by respondents effective May 5, 1961, pursuant to Special Permission Orders Nos. 1083, 2007, 2138, 2139, 2343, and 2344.]

APPENDIX II

Disposition of motions considered in the exceptions

1. Alcoa renews a motion to strike respondents' study of the intertrain switching time at Newport and North Little Rock and references thereto, because the witness

did not personally prepare the study, did not observe the particular operations, and could not advise if the switching delays were caused by the fluxing limestone cars or cars of other traffic. The witness is the chief cost accountant of the Missouri Pacific with general knowledge of the switching operations at these two points. The study was prepared at his request and he verified it by comparison with company records. The witness was cross-examined on the study, and his failure to analyze the switching time in another way goes to the weight to be accorded the evidence. The motion to strike is denied.

2. An industrial engineer employed by Alcoa at its refining plant at Bauxite, testified as to the assessed valuation of "buildings on the right-of-way" in the Batesville School District, which he learned from conversation with the assessor at the tax assessor's office. The evidence was objected to by the respondents, and the examiner granted their motion to strike on the grounds of hearsay. Alcoa excepts to the examiner's ruling, contending that the evidence is not hearsay because the information was obtained by observation, and that the conversation with the assessor was to establish normal markdown of assessed valuation. Rule 1.78 of our General Rules of Practice provides a method for admission of official records. Testimony by the witness as to the content of the conversation is clearly hearsay. We affirm the examiner's ruling.

3. An assistant director of traffic for Reynolds presented certain evidence based on testimony in a previous proceeding[1] as to service in handling fluxing stone at Myersville. The examiner concluded that the testimony was hearsay, or violated rule 1.82 of our General Rules of Practice. Thus, he granted the respondents motions to strike. Reynolds excepts because (1) the matter was sworn to by the witness; (2) the matter would normally be within the

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[1] *Arkansas Intrastate Freight Rates and Charges*, 298 I.C.C. 547 (1956).

knowledge of a person of his position; (3) he was a party in the State proceedings where these matters were developed; and (4) the respondents did not deny the matters nor request cross-examination thereon. The witness testified using the evidence in a previous proceeding as his authority for the information. The matter testified to in the previous proceeding was not presented in the manner required by rule 1.82, and it is clearly hearsay as to this witness. The examiner's rulings are affirmed.

4. The same witness for Reynolds stated that switching by the Bauxite and Northern and the absorption of the switching charge by the Missouri Pacific at Bauxite Junction are not dissimilar to switching by the Illinois Central and the absorption of switching charges by the Missouri Pacific at Baton Rouge, La., in connection with the multiple-car rates considered in the Prairie du Rocher case. The examiner concluded that opinions and conclusions of fact by a witness who has shown no knowledge, as here, of a railroad's switching operations at a particular point have no evidentiary value, and are irrelevant and immaterial. He granted the respondents' motion to strike. Reynolds excepts to the examiner's ruling on the grounds considered in 3 above. The witness did not qualify as an expert in railroad switching operations, nor did he show any personal knowledge of the railroads' switching operations at the two points involved. The examiner's ruling is affirmed.

5. The witness for Reynolds sought to testify as follows:

> The Texas rates cause undue or unreasonable preference or advantage to companies, firms or corporations in Texas using fluxing limestone in the production of iron or steel, with which aluminum competes. By maintaining these Texas intrastate rates, the complaining carrier thereby subjects Reynolds Metals Company to undue or unreasonable prejudice or disadvantage to the extent that the Arkansas rates on fluxing limestone were increased 19 percent under

Ex Parte Nos. 196 and 206, but without similar increase in the Texas rates, with resulting violation of the principles enunciated in Section 3 (1) of the Interstate Commerce Act.

The examiner concluded that the statement concerned matters not material to the issues in this proceeding, which concerns discrimination between the Arkansas interstate and intrastate rates, not preference between the Texas and Arkansas intrastate rates. Thus, he granted the respondents' motion to strike the statement. Reynolds excepts to the ruling, contending that the evidence was not to establish a basis for a finding of undue preference and prejudice, but to show that the Arkansas rates were on a higher basis than any other rates in southwestern teritory. The exception is without merit, since the statement stricken by the examiner deals with a difference in the level of rates within two States. The examiner's ruling is affirmed.

OFFICE OF
ARKANSAS COMMERCE COMMISSION

At a meeting of the Arkansas Commerce Commission, held in its offices, Justice Building, Little Rock. Arkansas, January 22, 1960.

CASE No. R-1237

IN THE MATTER OF INCREASED RAILWAY FREIGHT RATES AND CHARGES (X-212), INTRASTATE.

APPEARANCES:

Phillip A. Staskus and Ned A. Stewart, for Petitioners.

Harry E. Meek, Dixon Loos, Charles A. Kelly, Jack A. Williams, Leon B. Catlett, E. J. Anthoni, Maurice D. Dyer, Bill B. Demmer, Phillip A. Martin, and Clarence C. Dehne, Sr., for Protestants.

Harry E. McDermott, Jr. and W. M. Buttram, for the Commission

STATEMENT AND ORDER

By petition filed April 24, 1959, 16 railroads operating in Arkansas seek (1) authority to increase their freight rates and charges for intrastate transportation by railroads in Arkansas in accordance with and corresponding to the increases for interstate transportation authorized by the Interstate Commerce Commission on September 9, 1958, in Ex Parte No. 212, Increased Freight Rates, 1958, 304 I.C.C. 289, and (2) authority to publish and apply such increases in the same manner provided for the corresponding interstate increases.

After due notice, the matter was heard by the Commission in its offices on September 2 and 3, 1959. Protests were filed on behalf of various interests and representa-

tions were made by counsel for such interests at the hearing. Briefs filed by the parties have been considered.

In previous rate increase cases, the carriers have requested authority to increase all commodity rates percentage-wise across the board. This proposal, if granted, would allow the carriers to select specific commodities for increase in varying amounts subject only to managerial discretion.

The record shows the position taken by petitioners is that the increases are imperative due to increased cost of wages and in prices of materials and supplies, and to avoid unlawful discrimination against interstate commerce and the resulting preference and prejudice between persons and places in interstate and intrastate commerce. The same increases as those proposed herein have been authorized on interstate commerce, resulting in a net 2.3% increase which, if authorized, on intrastate commerce is estimated to produce $281,000 in increased revenue, based upon the 1955 volume of traffic.

The last rail rate increase authorized by this Commission on September 18, 1958, amounted to 12% and went into effect on or about October 23, 1958. Evidence introduced in this case shows system operating income for Class I railroads serving the State of Arkansas for the years 1952 through 1958. The same type exhibit was introduced in the last rate increase case covering the years 1952 through 1957. Discussion of comparisons reflected by such exhibit prior to 1957 would be of little probative value in this case, therefore, 1958 is the only full year of experience since 1957 which can logically be used for comparative purposes.

Exhibit No. 3, page 1, shows the system operating ratio for Class I railroads operating in Arkansas was 75.27 in 1957 as compared with 75.53 in 1958. Other portions of the

exhibit dealing with freight performance averages, average straight-time hourly wage rate, and average straight-time compensation per hour, give no comparison between 1957 and 1958. The index of Western District average unit prices shows the price ratio on all material and supplies rose from 108.9 in January, 1956, to 112.0 in April, 1959, an increase of 3.1. The record also shows the rate of return earned by the Missouri Pacific Railroad Company was 4.15 in 1957, as compared with 4.13 in 1958; the rate of return for other individual petitioners was not introduced.

As previously stated, the last intrastate rail rate increase (12%) became effective on or about October 23, 1958, thus the revenue and cost figures introduced in this hearing reflects only a little over two months' experience under said increase. In our opinion, this short period of time during the last months of the year, which ordinarily cannot be taken as representative of normal traffic movement, is not of sufficient duration to warrant a finding of a need for additional revenue, even if revenue and expenses for the last two months of the year had been separately stated for the record. It is not entirely clear upon what basis petitioner's witness arrived at his estimate of $281,000 to be gained by the carriers upon the granting of this proposal, except that the volume of traffic handled in 1955 was considered. Apparently the possibility of diversion did not enter into the expected amount of revenue to be gained. The Commission, however, is fully aware of and has considered such a possibility.

Representatives of virtually every producer, shipper and receiver of sand, gravel, and stone, including asphalt coated stone, appeared in opposition to the proposal. Opponents also included the aluminum industry, grain shippers, a plant food company, and a major lumber producer. Evidence was presented by protestants herein to show that, if the increases were granted and imposed, the commodities

produced, shipped, or received by them would bear substantially more than their proportion of the estimated gain in revenues.

Perhaps the most significant allegation made by petitioners is that, if the proposed increases are not authorized, unlawful discrimination between interstate and intrastate commerce will result causing preference and prejudice. Although this is not a 13th section case, the record fails to disclose any instance where possible discrimination could result upon denial of the petition. Mere differences in the measure of a rate standing alone is insufficient to establish undue preference or prejudice. We cannot agree with the position of petitioners in this respect.

Findings

After careful consideration of the matters and things involved herein and being well and sufficiently advised in the premises, we find:

1. Petitioners have failed to show that the 12% increase authorized on September 18, 1958, effective on or about October 23, 1958, is insufficient to meet increased operating expenses incurred by the carriers subsequent to such authorization.

2. Petitioners have failed to affirmatively established that failure of this Commission to grant the proposed increases will result in discrimination against interstate commerce.

3. That the petition should be denied.

Order

It Is Therefore, Ordered, That the petition filed April 24, 1959, by 16 railroads operating in Arkansas for authority to increase and publish increases in their freight rates and charges for intrastate transportation in the same manner and to the same extent as authorized for applica-

tion in interstate commerce in Ex Parte No. 212, BE AND IS HEREBY DENIED.

This 22nd day of January, 1960.

BY THE COMMISSION

KAY L. MATTHEWS,
Commissioner

ARNOLD B. SIKES,
Commissioner

ARTHUR M. SHIREY, JR.,
Commissioner

(SEAL)

ATTEST: /s/ GEORGIA WALKER
Georgia Walker, *Secretary*

OFFICE OF
ARKANSAS COMMERCE COMMISSION

At a meeting of the Arkansas Commerce Commission held in its offices, Justice Building, Little Rock, Arkansas, July 24, 1963.

CASE NO. R-1495

RE: PETITIONS FOR SUSPENSION OF SUPPLEMENT K-59 TO TARIFF OF INCREASED RATES AND CHARGES X-212, INTRASTATE

APPEARANCES:

Harry B. LaTourette, for Class I Railroads and three short line railroads.

Maurice D. Dyer, Willis S. Brunson, Joe Baldridge, Jack A. Williams, Sr., Harry Meek, Dickson R. Loos, Charles A. Kelley, James F. Day, Phillip A. Martin, Ed Anthoni, G. W. Kincheloe, for various shipper interests.

Harry E. McDermott, Jr., for the Commission.

REPORT AND ORDER

This case came to be docketed by reason of Petitions for Suspension being filed by a number of shipper interests requesting suspension of Supplement K-59 to Tariff of Increased Rates and Charges X-212 filed with the Commission to become effective October 30, 1962 on specified commodities moving in intrastate traffic by railroad.

On October 19th, 1962, the Commission set the matter of the Petitions for Suspension for hearing and suspended indefinitely Supplement K-59 to Tariff of Increased Rates and Charges X-212, pending such hearing. The matter was heard by the Commission on December 11, 12, 13, and 14, 1962, and January 29, 30, and 31, 1963.

The matter of Increased Rates and Charges X-212 was originally heard by the Commission in Case No. R-1237. The petition of the railroads operating in Arkansas for an increase in rates and charges in that proceeding was denied on January 22, 1960; the record in Case No. R-1237 is incorporated in this record by reference.

Voluminous testimony was introduced and numerous exhibits received in this case by petitioners and the respondent railroads. Briefs have been filed and considered.

Findings

After careful consideration of all matters and things involved herein, and being well and sufficiently advised in the premises, we find:

1. No showing has been made in this record which would warrant a conclusion different from that reflected in the order of this Commission in Case No. R-1237, January 22, 1960.

2. That the petition for permanent suspension of Supplement K-59, Tariff of Increased Rates and Charges X-212, should be granted.

ORDER

IT IS, THEREFORE, ORDERED, That Supplement K-59, Tariff of Increased Rates and Charges X-212, for application to the movement of intrastate traffic, BE, AND IS HEREBY, PERMANENTLY SUSPENDED.

This 24th day of July, 1963.

BY THE COMMISSION

SIGNED:

KAY L. MATTHEWS,
Chairman

JOHN H. GREENE,
Commissioner

TED DONHAM,
Commissioner

(SEAL)

ATTEST: /s/ JENNIE L. FURR
Jennie L. Furr, *Secretary*

APPENDIX C

OFFICE OF
ARKANSAS COMMERCE COMMISSION

At a meeting of the Arkansas Commerce Commission held in its offices, Justice Building, Little Rock, Arkansas, December 18, 1963.

CASE No. R-1506

IN RE: PETITIONS FOR SUSPENSION OF EFFECTIVE DATE OF SUPPLEMENTAL K-7 TO TARIFF OF INCREASED RATES AND CHARGES X-223-A.

APPEARANCES:

Harry B. LaTourette, For Class I Railroads. W. A. Feldmann, and Harold W. Mason, for Southwestern Railway Company. V. H. Livingston, for Missouri Pacific Railroad Company. Maurice D. Dyer, for Little Rock Chamber of Commerce, Ben M. Hogan & Co., J. H. Hamlen & Son, Inc., Little Rock Stone & Materials Co., Little Rock Grain Exchange, and Arkansas State Highway Department. J. F. Day, for Minnesota Mining & Manufacturing Co., and Big Rock Stone & Material Company. Joe Baldridge, for Arkansas Rice Growers Cooperative Ass'n., and Arkansas Grain Corporation. Jack A. Williams, Sr., for Reynolds Metals Company, and Reynolds Mining Corporation. Dixon R. Loos, and Harry Meek, for Aluminum Company of America. Paul S. Barnett, for Ideal Cement Company. Walter B. Smith, for Arkansas Cement Corporation. O. W. Watkins, for Ozan Lumber Company, and Dulin Bauxite Co. Phillip Martin, for Industrial Lumber Co., Wrape Stave Co., Searcy Flooring & Lumber Co., Kensett Lumber Corporation, J. W. Black Lumber Company, Ozark Lumber Industries, and J. W. Williams & Sons, Inc. Ed. Anthoni, for Bradley-Southern Division, Potlatch Forests. G. W. Kincheloe, for Crossett Division, Georgia Pacific Corp. Harry E. McDermott, Jr., for the Commission.

REPORT AND ORDER

The publishing agent of Class I railroads operating in Arkansas filed Supplement K-7, Tariff of Increased Rates and Charges X-223-A to become effective December 1, 1962, providing for an increase in rates on certain commodities and services performed by Class I railroads in intrastate commerce. The supplement was suspended pending a hearing and final determination.

Subsequent to the filing of said supplement on statutory notice to the public, petitions were received from a number of shippers requesting suspension of the supplement pending an investigation and hearing by the Commission. This proceeding came to be docketed in response to the said petitions.

After due notice, the matter was heard by the Commission on February 18, 19, 20, 21, 22 and 26. All parties in interest were given an opportunity to be heard.

A motion was received from Aluminum Company of America to dismiss the matter of increases in freight rates on fluxing limestone from Meyersville, Arkansas, to Bauxite Junction, Arkansas, and that the respondent rail carriers be directed to amend tariff supplements now pending removing such fluxing limestone from the proposed increases involved in this proceeding. The motion is denied for the reason that it does not state sufficient grounds to sustain dismissal.

A motion was received from the Little Rock Chamber of Commerce that the Commission treat this proceeding as an application of the Class I rail carriers for an increase in rates and charges. No ruling on the motion was made, however, the Commission proceeded to hear evidence of the carriers in support of their position, and of the protestants in opposition to the considered increases.

The Ex Parte 223 increases in rail rates became effective on interstate traffic throughout the United States on Oc-

tober 24, 1960. The rail carriers are now seeking approval of the same level of increases on intrastate traffic in Arkansas. A rail representative testified, "If this is accomplished it will enable us to apply the same increase to interstate rates applying between stations in Arkansas, i. e., rates between two given points in Arkansas via routes through adjoining states which at present are equalized with rates applying via routes wholly within the State of Arkansas".

The testimony shows that, "Whenever the operating costs of the railroads throughout the country advance to the point where railroad management finds that increased revenues are necessary in order to maintain efficient operations, the management determines the amount of additional revenue required and then takes the necessary steps to effectuate the increase. That increase is determined on a national basis, taking into consideration all traffic handled by the railroads both interstate and intrastate and the measure of the increase so determined is expected to result in the required amount of additional revenue from both interstate and intrastate business."

Many exhibits were introduced in this proceeding to substantiate the carrier's position that their cost of operation has risen to the point where additional revenue is desired. This evidence is based upon system costs generally. In past cases involving a request for additional revenue, the allegation has been made that commodities moving in intrastate commerce in Arkansas are not bearing their proportionate share of the cost of operation. Proof that such is the case in the case now before the Commission is conspicuously absent, the carriers merely state that additional revenue is needed to bring the intrastate level of rates up to the level in effect on interstate commerce.

One of the carrier's witnesses testified that "The Ex Parte 223 increase is not a so-called Selective increase". However, a subsequent rail witness introduced an exhibit

consisting of four (4) pages listing the commodities the carriers elected not to increase although increases had been authorized to become effective on interstate traffic. The same witness testified that, in the event like increases were approved by this Commission, the carriers did not intend to apply them on intrastate traffic. This policy of the carriers results in selective increases to the detriment of shippers of commodities upon which the carriers elect to impose the increase regardless of whether the commodities are moving in intrastate commerce or interstate commerce. Such a policy too, has the effect of changing the historic rate base relationship between commodities.

There is no evidence of probative value in this record to substantiate the interference on the part of the carriers that present intrastate rates are a burden upon interstate commerce, or that such rates actually constitute preference or predudice. On the contrary, the record contains many unreconcilable contradictions. The carriers estimate the proposed increase in rates would produce $619,000 annually. Under the present rates, the Arkansas carriers spend 90.76 cents out of each dollar taken in; this amount is their total cost which includes operation, rents, taxes, etc.

The mere desire of the carriers to harmonize the intrastate rates with the interstate level of rates standing alone is insufficient grounds to justify the increase sought.

Findings

After careful consideration of all matters and things involved herein and being well and sufficiently advised in the premises, we find

1. The rail carriers parties to Supplement K-7 to Tariff of Increased Rates and Charges, X-223-A, Issued by J. A. Boyer, Tariff Publishing Officer, Southwestern Freight Bureau, have failed to sustain the

burden of proof necessary to warrant authorization of the increase in rates on the commodities involved.

2. That said Supplement K-7, Tariff of Increased Rates and Charges, X-223-A, issued by J. A. Boyer, Tariff Publishing Officer, Southwestern Freight Bureau, should be permanently suspended without prejudice.

ORDER

IT IS, THEREFORE, ORDERED, That Supplement K-7, Tariff of Increased Rates and Charges, X-223-A, issued by J. A. Boyer, Tariff Publishing Officer, Southwestern Freight Bureau, BE, AND IT IS HEREBY, PERMANENTLY SUSPENDED without prejudice.

This 18th day of December, 1963.

BY THE COMMISSION

SIGNED:
KAY L. MATTHEWS,
Chairman

JOHN H. GREENE,
Commissioner

TED DONHAM,
Commissioner

(SEAL)

ATTEST: /s/ JENNIE L. FURR
Jennie L. Furr, *Secretary*

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

1159

ALUMINUM COMPANY OF AMERICA and REYNOLDS METALS COMPANY,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Arkansas.

MOTION TO AFFIRM.

HARRY B. LaTOURETTE,
1517 West Front Street,
Tyler, Texas 75702,
ROBERT H. STAHLHEBER,
2008 Missouri Pacific Building,
St. Louis, Missouri 63103,
Attorneys for Rail Carrier Appellees.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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Cases Cited.

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Revised Rules of the Supreme Court of the United States, Rule 16, Paragraph 1 (c) 1

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

ALUMINUM COMPANY OF AMERICA and REYNOLDS METALS COMPANY,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Arkansas.

MOTION TO AFFIRM.

Come now the Arkansas rail carriers, intervening defendants and appellees in the above-entitled case, and, pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of the Supreme Court of the United States, move to affirm the final judgment of the District Court on the ground that the question presented is so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal from a judgment by a statutory three-judge court (United States District Court for the Eastern District of Arkansas—Pine Bluff Division) sustaining and upholding the report of the Interstate Commerce Commission in I. C. C. 34373, **Arkansas Intrastate Freight Rates and Charges**, 326 I. C. C. 19. In its underlying proceeding the Interstate Commerce Commission had found that the involved Arkansas intrastate freight rates and charges caused unjust discrimination against and constituted an undue burden upon interstate commerce and that such unlawfulness should be removed by permitting the application upon Arkansas intrastate rates of the so-called Ex Parte 212 and 223 increases long since applicable upon counterpart interstate rates.

While the report of the Interstate Commerce Commission stated that an order would be entered in the absence of an indication by the Arkansas Commission that the subject increases would be permitted to become effective, such order was never issued. It was unnecessary because the Arkansas Commerce Commission on November 5, 1965, ordered that such increases should be made effective.

The report of the Interstate Commerce Commission, like the Examiner's report which had preceded it, deals in detail with all controlling aspects of this Thirteenth Section proceeding, makes all of the required findings, and reaches the clearly correct conclusion that the unincreased Arkansas intrastate rates failed to contribute their fair share to the railroads' revenue requirements and caused unjust discrimination against and an undue burden on interstate commerce.

As clearly evidenced by the Commission report and as properly found by the Court below, the findings of the

Commission were fully supported by substantial evidence. Indeed, it is clear that an unusually compelling Thirteenth Section case was presented and that it has been correctly evaluated by the Commission and by the District Court.

There is here presented only a single and notably narrow issue. The appeal is presented solely on behalf of two aluminum companies and directs itself to a single movement (crushed limestone used for fluxing in the production of alumina and moving from Myersville, Arkansas—with lesser amounts sometimes moving from the related origin of Limedale, Arkansas, at the same rate—to Bauxite, Arkansas). Essentially, it is appellants' contention that even though the unincreased intrastate rate in question is notoriously low and well below the general level of interstate rates on crushed limestone from, to, and through Arkansas, it may not be here increased because of the mere existence of a **single** interstate rate published on a lower basis to meet a compelling barge competitive situation from Prairie Du Rocher, Illinois, to Baton Rouge, Louisiana.

As will be demonstrated, appellants' contention rests on several apparent misconceptions and is completely without merit. The crushed limestone or fluxing stone movement here under consideration is clearly the most important single movement which was involved in the proceeding before the Commission. Much of the evidence and a substantial part of the Commission's analysis and consideration is devoted to this specific phase of the case. As demonstrated by the Statements of Witnesses Livingston and Kleinsorge, and as is apparent from the Commission's report (J. S. 22a-30a)* and the Opinion of the District Court (J. S. 11a-14a), the fluxing stone situation was perhaps the most compelling example of unlawful failure on

* These references are to pages of the Appendix to Appellants' Jurisdictional Statement.

the part of the Arkansas intrastate rates to bear their fair share of the revenues required by the railroads. No other situation more clearly demanded application of the subject increases in order to remove an unlawful burden on interstate commerce.

The question now presented—which urges comparison, not with the general level of interstate stone rates, but with a single barge-competitive rate in no way affecting appellants—is so obviously without substance as to warrant no further consideration.

ARGUMENT.

We shall hereinafter show that the subject fluxing stone situation compelled the findings and disposition made by the Interstate Commerce Commission; that such disposition clearly rests on the prior existence of unlawful discrimination against and unlawful burden upon interstate commerce (with the Commission's findings as to reasonableness being a necessary incident to its disposition); that the position of appellants has neither substance nor merit; and, further consideration by this Court being unwarranted, the judgment of the three-judge district court should be affirmed.

The "Fluxing Stone" Situation Presents a Most Compelling Example of Unlawful Discrimination Against and Undue Burden on Interstate Commerce.

Not only did this movement of crushed stone for fluxing not bear the Ex Parte 212 and 223 increases which had originally been computed on the theory **that if applied to both interstate and intrastate** traffic they would help to meet, but not entirely eliminate, the carriers' proven revenue needs,[1] but by reason of a "reclassification"[2] during the pendency of an earlier Thirteenth Section proceeding, this movement had escaped or avoided the effect of numerous earlier increases applying generally to interstate and most intrastate traffic.

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[1] 304 I. C. C. 289, 300 (Appendix to Order) and 311 I. C. C. 373, 385 (Appendix A to Order). See also **King v. United States** (1952), 344 U. S. 254, 257.

[2] It must be remembered that the "fluxing stone" used by appellants is merely crushed limestone, which prior to 1956 always moved on the higher crushed stone basis, and which, but for the State Commission's "reclassification", would still be moving at those rates (Original Statement Witness Livingston and his Rebuttal Statement, page 1).

The Commission's report devotes some seven pages to this fluxing stone rate (J. S. 22a-30a). The comparisons there set forth demonstrate without doubt that the subject rate of only $1.38 is very low. Of particular significance is the comparison with the present single line interstate rates of $2.25 and $2.39 (J. S. 25a, see also Exhibit VHL-3 and Statement Witness Livingston, pages 12-13). Based on its careful analysis of the detailed cost material presented of record by both the railroads and the aluminum companies, the Commission also made the very significant finding that **the $1.38 rate was actually below the railroads' out-of-pocket costs of handling this particular traffic** (J. S. 30a). This is not particularly surprising in view of the nature of the movement as described in the Statement of Witness Tompkins and in the Commission report (J. S. 30a). It is, in fact, readily understandable when it is recalled that the $1.38 rate is actually lower than the rate which applied in the depths of the depression (Witness Livingston's Sworn Statement, page 10, Exhibit VHL-2, District Court Opinion, J. S. 12a).

The strikingly low nature of this fluxing stone rate and the compelling nature of the unlawfulness with respect thereto is detailed in the Testimony of Witnesses Livingston and Kleinsorge; it is treated in the argument portion of the railroads' pleadings before the Commission (pages 20-24, railroads' Original Statement of Facts and Argument, pages 23-26, railroads' Reply Statement of Facts and Argument); and, in addition to the previously mentioned extensive attention accorded it by the Commission, it is dealt with at pages 10-13 of the three-judge court Opinion (J. S. 11a-14a). The record leaves no doubt as to the particularly demanding nature of the unlawful situation with respect to the unincreased fluxing stone rate.

The Commission's Conclusions With Respect to the Necessity of Increases in the "Fluxing Stone" Rate Rest on Findings of Unjust Discrimination Against, and Undue Burden on, Interstate Commerce.

One of the fundamental misconceptions running through appellants' Jurisdictional Statement is the expressed view that the Commission's conclusion or disposition with respect to fluxing stone did not rest on a determination of burden on interstate commerce but rather upon the Commission's view as to what constituted a maximum reasonable rate level (see, for example last page (10) of Jurisdictional Statement). There is no basis whatsoever for this confused position.

All of the general analysis, conclusions and findings of the Examiner, as specifically adopted by the Commission (J. S. 19a), as well as the ultimate findings of the Commission, beginning at its page 19 (J. S. 41a), apply to this fluxing stone movement along with other involved movements. Those findings make it clear beyond any doubt that the basic unlawfulness as found by the Commission was the existence of "undue, unreasonable, and unjust discrimination against, and an undue burden on, interstate commerce" (Finding 3, J. S. 41a).

As is always necessary in any Thirteenth Section proceeding, the Interstate Commerce Commission had to consider whether the rates resulting from the subject increases would be reasonable. It is clear that the Interstate Commerce Commission may not order increases to levels which exceed **maximum reasonable** levels. **King v. United States**, (1952), 344 U. S. 254, 274.

Therefore, in addition to its finding of unjust discrimination or unlawful burden, the Commission had to, and did, make the requisite findings as to reasonableness of the resulting rates as increased (Commission's ultimate

Finding 5). However, appellants' contention that the Commission's conclusions with respect to fluxing stone rest on a difference of opinion as to the proper level of maximum reasonableness merely illustrates one of the basic misconceptions upon which the appeal is based. As is the case with all of the other involved commodities, the Commission's jurisdiction over, and basic findings with respect to, the fluxing stone rate rest on the failure of that rate to bear its fair share of the carriers' revenue needs and the resultant unjust discrimination against and undue burden upon interstate commerce. Because the aluminum companies raised so many relatively meaningless comparisons having possible relevance only to the question of reasonableness (the Texas intrastate rates, etc.), the Interstate Commerce Commission was called upon to devote more attention to the secondary or reasonableness question in the case of the fluxing stone than in the case of most of the other movements. Obviously, of course, this **does not mean** that it concluded that the fluxing stone rate had to be increased **because** it was not at a maximum reasonable level.

It is entirely clear that the Commission found the rate had to be increased in order to remove an unlawful burden on interstate commerce, an unjust discrimination against interstate commerce, and that it then found that the increased rate would not exceed a maximum reasonable level. It was in connection with this secondary, but necessary, finding that the Commission correctly considered and rejected the several improper standards of reasonableness (such as intrastate rates in another state, a greatly depressed barge competitive rate which for various reasons was shown to be an inappropriate comparison, etc.).

Appellants' Position Has Neither Substance Nor Merit.

In addition to the previously mentioned basic misconception, appellant makes the wholly untenable argument that the Commission's action with respect to the Arkansas fluxing stone rate was rendered improper by the mere existence of a single barge-compelled rate on a crushed limestone movement from Prairie Du Rocher, Illinois, to Baton Rouge, Louisiana, which movement happened to pass through a part of Arkansas. The facts with respect to that depressed, highly-competitive rate are reported in detail in **Limestone, Prairie Du Rocher, Ill., To Baton Rouge, La.**, 313 I. C. C. 71. They are treated by Witness Livingston at pages 12-14 of his rebuttal statement. That was a situation in which the railroads some years ago had to voluntarily reduce their rate on that single long-distance move in order to avoid losing the entire movement to private barge. The Interstate Commerce Commission merely approved the greatly reduced railroad rate as not being below a **minimum** reasonable level. It is an entirely different situation than the present Arkansas fluxing stone move, as to which, despite the absence of carrier competition of any kind, the rate is at a level so low as not to cover the out-of-pocket costs incurred in that relatively more cumbersome movement involving several interchanges, etc.

The significant fact is that the Arkansas rate is well below the general level of crushed stone rates to, from, and through the State of Arkansas, and even as here increased, it will continue to be well below such general interstate level (Witness Livingston Original Statement, pages 2-13, and Exhibits there referred to). If the mere existence of a single admittedly greatly depressed rate to meet barge competition from an Illinois point to a Louisiana point could have the effect urged by appellants, it would mean that the Interstate Commerce Commission

could not act under its well-recognized Thirteenth Section powers to remove unlawful burdens on interstate commerce and to require intrastate rates to make the same relative prior contributions[3] to the railroads' revenue needs. In a case such as the present one, such untenable theory would presumably nullify the all-important Thirteenth Section power not only in Arkansas but at least also in Illinois and Louisiana, the origin and destination States to and from which the single isolated point-to-point barge competitive rate is published. The only other alternative would be for the carriers to forego a very important interstate movement, which as shown by the Commission's report in the **Prairie Du Rocher** Case, would move by private barge if that rail rate were to be maintained on a higher level.

Obviously, of course, the existence of such single depressed rate cannot have the effect urged by appellants. The appropriate comparison is with the general level of interstate rates. The single barge compelled depressed rate is not a rate with which the Arkansas fluxing stone rate may appropriately be compared. The Commission proceeding which forms the predicate for appellants' entire theory, **South Carolina Intrastate Freight Rates and Charges**, 300 I. C. C. 307, involved, not a single barge-compelled rate from and to points in other states, but an **entire scale or level of lower interstate rates** specifically applying to numerous movements from, to, and within the State in question, South Carolina. Moreover, there was absolutely no question but that both the lower interstate scale and the higher intrastate rate applied to the commodity there in question, pulpwood. As the Commission specifically noted in the present proceeding (J. S.

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[3] Such "prior contribution" test has recognized significance in Thirteenth Section cases; see **Increases in Florida Intrastate Rates**, 278 I. C. C. 41, 67; **Montana Intrastate Freight Rates and Charges**, 284 I. C. C. 167, 203 and numerous similar cases.

27a), the tariff description applicable to the Arkansas stone, which is used in the production of alumina, would not so much as apply to the crushed stone from Prairie Du Rocher, which is used in the alkali industry.[4] Again, as pointed out by the Interstate Commerce Commission, there is no showing of interchangeability of the two types of stone and there is certainly not the slightest suggestion of competitive relationship.

Thus, there are numerous reasons why the barge-compelled Prairie Du Rocher rate is not an appropriate comparison where, as here, the subject Arkansas rate is so far below the general level of interstate rates, so clearly fails to make its appropriate prior contribution to the railroads' revenue needs, so obviously represents perhaps the most compelling instance of the unjust discrimination against, and undue burden on, interstate commerce found here to exist, and which so undeniably will still be well below a maximum reasonable level when increased as contemplated.

It is clear that the Commission correctly evaluated the situation and properly recognized that the Prairie Du Rocher rate constituted an inappropriate comparison for the purposes urged by appellants. As noted by the District Court, this is an area squarely within the particular competence and expertise of the Interstate Commerce Commission, and its analysis and findings are entitled to substantial weight. **Mississippi Valley Barge L. Co. v. United States** (1934), 292 U. S. 282, 286-287; **Board of Trade v. United States** (1942), 314 U. S. 534, 546. The contentions of appellants—based essentially on the mere existence of one rate with which comparison may not even appropriately be made—are as nothing in the face

[4] The Arkansas rate applies only to a commodity meeting the description "Limestone, run of crusher to be used only for fluxing purposes, in the production of Alumina, . . ." (Witness Livingston Original Statement, page 1).

of the Commission's well-reasoned analysis and proper disposition of this compelling situation.

In addition to their untenable attempt to give undue effect to the single competitively depressed Prairie Du Rocher rate, appellants make a number of other observations which illustrate basic misconceptions with respect to the nature and theory of a proceeding of this type. As previously noted, they repeatedly indicate an erroneous belief that the Interstate Commerce Commission was exercising a "maximum reasonableness" power, when it is clear that the Commission action rests on findings of compelling unlawful discrimination against the undue burden upon interstate commerce. On page 5 of the Jurisdictional Statement, appellants set forth two findings which the Commission has allegedly made with respect to the involved fluxing stone. As set forth, they are inaccurate. Not only did the Commission make no such specific findings, but it is clear that we are not here dealing with levels, scales, or multiple rates used by the aluminum industry and the alkali industry. The unquestioned fact is that the **single** Arkansas rate in question is much lower than the general level of interstate crushed limestone rates from and to Arkansas and that the only alkali-industry reference is to a **single** barge-compelled rate which is far below general rate levels and which has no real bearing of any kind on this case.

To suggest, as appellants do on page 9 of their Statement, that there is unlike treatment as between the alkali industry and the aluminum industry is not only completely without factual support, but it is an allegation in no way relevant to this proceeding. There is no showing as to any alkali industry in Arkansas, much less of any competition between appellants and any such industry. Significantly, **any other shipper of crushed limestone, regardless of his industry affiliation** and regardless of whether the shipments were to Arkansas, from Arkansas,

or within Arkansas, would bear applicable rates much higher than those which appellants have long enjoyed.

On the same page 9, appellants also suggest that some sort of discrimination exists because of allegedly lower intrastate rates used by steel companies within Texas. Again, this is not factually accurate (Witness Livingston Rebuttal Statement, pages 1-4). More significantly, the relationship of intrastate rates in one state to those in another has little or no relevancy in a Thirteenth Section proceeding. **Arkansas Intrastate Freight Rates and Charges**, 298 I. C. C. 547, 557. The significant inquiry, as always in such case, is as to the relationship between the intrastate rates in question and the general interstate level on movements to, from, and within the same state. Only thus can it be determined if the unincreased intrastate rates are bearing their proper share of the transportation burden, whether they are making their proper proportionate contribution as compared to their prior contribution before initiation of the subject Ex Parte increases, etc.

Of significance only in that it illustrates appellants' misunderstanding of vital aspects of the case, is the page 6 (of Jurisdictional Statement) contention that the Interstate Commerce Commission has erroneously fixed maximum rate levels and improperly seized jurisdiction from the Arkansas Commission. As already noted, the Interstate Commerce Commission has merely found the existence of unjust discrimination against interstate commerce, that the subject increases must be applied in order to remove such unlawfulness, and that when so treated, the rates will not exceed maximum reasonable levels. This is the clear duty of the Interstate Commerce Commission in a proceeding of this type and on the basis of a compelling record such as here presented. However, the rates are not here "frozen" within the Federal Commission's jurisdiction. To the contrary, the Arkansas Commerce

Commission has authorized the increases before an actual Interstate Commerce Commission order was issued. Hence, the Arkansas Commission retains jurisdiction of the rates. Should it, for example, wish to authorize further increases, it would in no way violate any order of the Interstate Commerce Commission.

On page 8, appellants suggest in passing that since in 1956 the Arkansas Commission prescribed a maximum reasonable rate on this stone, the Interstate Commerce Commission may not require an increase, apparently without regard to the question of how compelling may be the discrimination or burden on interstate commerce. Merely to state this proposition is to show its frailty. Obviously, the significant Thirteenth Section power of the Interstate Commerce Commission may not be nullified by a state commission's designation of a rate as a maximum reasonable rate. As shown by the record, the often-reduced, non-compensatory Arkansas fluxing stone rate was never properly a maximum reasonable rate. However, had it ever properly had such status, this would in no way lessen the Interstate Commerce Commission's power to require its increase in order to remove compelling unlawful discrimination against interstate commerce (found to exist approximately a decade later).

On page 9, appellants ask how a rate wholly within Arkansas can burden interstate commerce. Obviously, every rate ordered increased in every Thirteenth Section proceeding is applicable wholly within some state or another. Such is the nature of a Thirteenth Section proceeding; such is the almost inevitable result of failure on the part of intrastate rates to bear increases found necessary for overall application in order to meet carrier revenue needs. It is the duty of the Interstate Commerce Commission to eliminate such unlawfulness on the basis of a record as here made. In this connection, as elsewhere, appellants seek to compare inappropriate stand-

ards—such as a single depressed rate, or other intrastate rates—when indisputably the proper standard is the general level of interstate crushed limestone rates. The Interstate Commerce Commission has properly recognized the invalidity of appellants' position and contentions.

CONCLUSION.

This is a rather typical Thirteenth Section proceeding in which the Interstate Commerce Commission has properly acted to eliminate a clearly unlawful burden on interstate commerce resulting from the failure of certain Arkansas intrastate rates to bear their fair share of the increased revenue needs of the rail carriers serving that state.[5] Perhaps the most compelling example of unlawfulness was to be found in the point-to-point movement of substantial quantities of crushed limestone used by the appellant companies in the aluminum industry. The record was unusually complete with respect to this commodity. The Examiner who heard the case and the Commission itself dealt with the subject in detail and properly found that this particular movement—long favored by concessions and reductions—had to bear the involved increases in order to eliminate an unlawful burden. The Commission carefully and correctly noted that even when increased the rate would remain much lower than the general level of interstate crushed limestone rates applicable from, to, and within Arkansas. Hence, with indisputable soundness the rate as increased was found not to exceed a maximum reasonable level.

Appellants have presented what amounts to a final effort to avoid bearing a proper proportionate share of

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[5] The Commission has also provided full protection to any individual Arkansas rate situation which might warrant unique treatment (Proviso to Finding 4, paragraph following Finding 6, J. S. 42a). Thus if, contrary to fact, appellants' position had merit, proper recourse would be available before the Commission.

these increases long borne by interstate traffic. Apparently realizing the overwhelmingly impressive showing with respect to their commodity, appellants do not make the usual Thirteenth Section arguments. Instead, they point to a single long-distance, barge-compelled rate from a point in Illinois to a point in Louisiana and argue, in effect, that by reason of such single rate the clearly unlawful Arkansas intrastate situation with respect to their unrelated movements of crushed limestone cannot be rectified. The theory is obviously without substance. If such single rate could have the effect urged by appellants, it would mean that Section Thirteen relief could rarely be obtained with respect to any intrastate rates. It is evident that in virtually every such proceeding there could be produced one or more isolated point-to-point interstate rates which, for the compelling competitive reasons peculiar to those moves, were on greatly reduced levels. But these are not the appropriate comparisons. The Interstate Commerce Commission has properly so recognized and the District Court, upon careful consideration, has correctly sustained the Commission's well-reasoned report.

This appeal presents nothing of substance and hence provides no justification for further review. The judgment of the three-judge court should be affirmed. It is respectfully so moved.

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Certificate of Service.

I, Robert H. Stahlheber, one of the attorneys for the rail carrier appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of April, 1967, in accordance with the governing rules, I served copies of the foregoing Motion to Affirm on interested parties of record, including the following:

1. On appellants by air mailing copies duly addressed with postage prepaid to their attorney, Dickson R. Loos, 888 17th Street, N. W., Washington, D. C. 20006.

2. On the United States of America by air mailing copy with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530.

3. On the Interstate Commerce Commission by air mailing copy postage prepaid to Leonard S. Goodman, Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423.

.....

Robert H. Stahlheber,
2008 Missouri Pacific Building,
St. Louis, Missouri 63103.



In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1159

ALUMINUM COMPANY OF AMERICA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 15a), dismissing appellants' suit to set aside a decision of the Interstate Commerce Commission in its Docket No. 34373, *Arkansas Intrastate Freight Rates and Charges*, 326 I.C.C. 19 (J.S. 16a–74a). In this proceeding, the

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Commission authorized railroads operating within the State of Arkansas to increase certain intrastate rates and charges pursuant to Section 13(4) of the Interstate Commerce Act, 49 U.S.C. 13(4), in order to bring the rates in parity with rates the Commission had previously approved for traffic moving through Arkansas and other States in interstate commerce.[1] Appellants limit their appeal to the increase as it applies to one individual commodity—fluxing limestone used in the process of manufacturing aluminum moved by the railroads within Arkansas.

After the interstate increases, the Arkansas Commerce Commission denied petitions by sixteen railroads for comparable increases in the rates for railroad service within Arkansas (see J.S. 75a–86a). The principal railroads operating in that State then petitioned the Interstate Commerce Commission to enter upon an investigation pursuant to Section 13(4) of the Interstate Commerce Act, 49 U.S.C. 13(4),[2] to

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[1] The interstate increases were authorized in *Ex Parte No. 212, Increased Freight Rates, 1958*, 302 I.C.C. 665, 304 I.C.C. 289; and in *Ex Parte No. 223, Increased Freight Rates, 1960*, 311 I.C.C. 373, and various sub-numbers (see J.S. 17a, note 2).

[2] Section 13(4) provides in pertinent part:

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such [intrastate] rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups

determine whether the lower level of Arkansas rates imposed an undue burden on interstate commerce. Evidence was submitted by the railroads, shippers, and shipper organizations; the Arkansas Commerce Commission filed a brief opposing the increases.[2]

The railroads' evidence showed that the 1958 and 1960 interstate increases, which they here sought to apply on intrastate traffic, would not fully compensate for increased costs occurring after 1960. They sought merely to cover a portion of the ten separate wage increases experienced from 1956 to 1960, and the 23 percent increase in costs of materials and supplies, including fuel, from 1952 to 1960 (J.S. 48a–49a). These same railroads reached a low of 3.37 percent rate of return on their investment in 1960, and attained only 4.27 percent in 1962, the most recent year of record (J.S. 49a, Exh. TJH–1).

The Commission found (1) that the railroads operating in Arkansas had incurred increased costs on both interstate and intrastate traffic; (2) that the conditions incident to the intrastate transportation of freight are no more favorable than those incident to the interstate transportation of freight; and (3) that the Arkansas intrastate rates and charges failed to

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of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden * * *."

[2] The Arkansas Commerce Commission made no appearance in the district court.

provide their fair share of the overall system revenue required by the carriers (J.S. 41a–42a). The Commission took into account the Arkansas full-crew law (requiring an additional switchman in certain instances on trains operating in Arkansas) and the economics of shorter intrastate hauls, both of which tend to make intrastate operations somewhat more costly than interstate service (J.S. 21a, 54a). It also considered evidence relating to individual commodities. It made exhaustive findings regarding fluxing limestone (J.S. 22a–30a),[4] alumina (J.S. 30a–33a) and sand, gravel, and crushed stone (J.S. 33a–37a); and adopted the findings of the hearing examiner relating to soybeans, soybean meal (J.S. 62a–63a), and lumber (J.S. 63a–64a). On the basis of these findings, it concluded that the intrastate rates on these commodities were unduly low, and that the lower intrastate rates imposed an undue and unreasonable burden upon interstate commerce (J.S. 41a). Exercising the power conferred on it by Section 13(4)

[4] The Commission found that the present intrastate rate on fluxing limestone used in the production of alumina is 138 cents per ton, and the railroads seek to increase it to 158 cents (J.S. 23a). The present single-line interstate rates, for the same distances, would be 225 or 239 cents, depending upon the length of haul (J.S. 25a). The fluxing limestone is transported either 136 or 150 miles from a crushing plant to appellants' refining plants. (J.S. 22a). Since the other stone rates which appellants cited for comparison were both depressed on account of competition and concerned different commodities, the Commission held that such other rates did not properly measure the maximum reasonable level of rates on fluxing stone. (J.S. 25a–27a). Consequently, the individual rate on the commodity fluxing limestone, even when viewed separately, discriminated against and imposed an undue burden on interstate commerce.

(*supra*, n. 2, p. 2), it ordered the intrastate charges increased.

Two aluminum companies and a grain corporation[3] sued to set aside the Commission's decision. The district court unanimously sustained the Commission. It held that the Commission's findings were supported by substantial evidence, and that no higher standard was required in proceedings under Section 13(4); that in this general system-wide revenue proceeding the Commission was not required to consider the reasonableness or comparability of rates on individual commodities; and that, to the extent that it nevertheless considered specific rates relating to fluxing limestone, its weighing of comparability and cost data were matters peculiarly within the competence of the Commission (J.S. 3a–15a). *Arkansas Grain Corp.* v. *United States*, 263 F. Supp. 480.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

1. Appellants' sole attack is upon the findings concerning one commodity among the numerous commodities moving in intrastate commerce in Arkansas—fluxing limestone used in aluminum production. But in this general revenue proceeding under Section 13(4) the Commission was not required to consider the characteristics of individual commodities, for "[i]t is plain from the nature of the inquiry that the

[3] The Aluminum Company of America, Reynolds Metals Co., and the Arkansas Grain Corp. Only the aluminum companies have appealed.

rate level * * * was found reasonable on the basis of the traffic as a whole" (*Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 483); and it was "not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case" (*King* v. *United States*, 344 U.S. 254, 275).[6] That portion of the Commission's decision which approves the increases sought by the railroads system-wide throughout Arkansas, without relation to their effect on individual commodities, is sufficient to support its decision.

2. Even if the findings related specifically to fluxing limestone are considered, the decision is amply supported. Appellants base their challenge upon comparisons with two other rates, both of which the Commission rejected as inapplicable. First, appellants rely upon the "interstate rate * * * applicable on fluxing stone in the same general territory" (J.S. 4), asserting that the intrastate rate has been raised to a level above the interstate rate. But they are mistakenly attempting to equate the rate on intrastate shipments of fluxing limestone used in manufacturing aluminum with interstate shipments of crushed limestone used in the alkali industry (J.S. 6, note 4). The Commission specifically found this comparison to be

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[6] Indeed, Congress codified this principle in the 1958 amendment to Section 13(4), 72 Stat. 570, which in effect specified that the Commission need consider only whether intrastate rates unduly burden interstate commerce (72 Stat. 570). See S. Rep. 1647 on S. 3778, 85th Cong., 2d Sess., pp. 20–21 (1958); H. Rep. 2274, 85th Cong., 2d Sess., p. 11 (1958); 104 Cong. Rec. 15528 (remarks of Senator Smathers); and see *Oklahoma Corporation Commission* v. *United States*, 235 F. Supp. 803, 807–808 (W.D. Okla.).

inapposite because the interstate rate for the alkali industry applied only to a type of crushed limestone which was not shown to be interchangeable or competitive with fluxing limestone, and which was differentiated in the tariffs of the railroads (J.S. 27a).[7] Second, appellants seek to analogize to the lower rates which are maintained on fluxing stone for the iron and steel industry in the neighboring State of Texas (J.S. 9). But the Commission noted that the Texas rates applied primarily on sand, gravel, and other aggregates which, unlike the present case, could not bear higher increases due to market competition; further increases there would engender a traffic loss to the railroads (J.S. 25a–26a). Thus, the Commission concluded on the present record that the individual rate on fluxing limestone, even when viewed separately from all other intrastate rates, discriminates against and unduly burdens interstate commerce and must be modified accordingly.

[7] Appellants urged before the hearing examiner that the two commodities *differed*, and the railroads urged they were *the same* (J.S. 23a). The parties thereafter switched their positions on this factual question.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Docket No. 1159

ALUMINUM COMPANY OF AMERICA, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal From the United States District Court for the Eastern District of Arkansas

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to rule 16(3) of the Supreme Court Rules, appellants submit this brief in opposition to motions to affirm filed by the United States and the Interstate Commerce Commission, and the Arkansas Railroads, appellees in the above styled case. An extension of time for filing the Motion to Affirm was obtained by

the government until May 19th. However, the appellee railroads submitted their Motion to Affirm on April 19, and the Motion on behalf of the government was received by appellants on April 28. By agreement among the parties, this brief will be in opposition to both Motions.

GROUNDS FOR JURISDICTION

Since this is a direct appeal from a final judgment of a Three-Judge District Court involving the validity of an Interstate Commerce Commission decision, no question was raised concerning the jurisdiction of this Court on appeal. The basic contentions made by both Motions are that no substantial questions are raised which require plenary consideration by this Court.

THE QUESTION PRESENTED

The statement on behalf of the government, in its Motion to Affirm, brings the nature of the question which appellants seek reviewed into sharp focus. As the government pointed out (p. 5), appellants' sole attack concerns one commodity among many moving in intrastate commerce in the state of Arkansas. That commodity is fluxing stone.

It is correct that it is unnecessary for the Commission to support its decision, in a section 13 case, with a fully developed rate case on each and every commodity moving in intrastate commerce. The Commission's decision may rest upon the broad basis of general revenue discrimination. However, this is not what the Commission did. A major portion of the Commission's report dealt with the fluxing stone case (Jurisdictional Statement, 22A-30A). All of the contentions raised by appellants were rejected and the Commission con-

cluded that the Arkansas rates, including the fluxing stone rate, were unduly low, constituted an undue burden on interstate commerce, and unjustly discriminated against interstate commerce in violation of section 13(4) of the Interstate Commerce Act. (J.S. 41a) Immediately thereafter, (J.S. 42a) the Commission provided that its ultimate findings and conclusions are "without prejudice" to the right of a shipper to apply to the Commission for modification of any individual intrastate rate on the ground that such rate does not contravene the provisions of section 13.

But appellants had already stated their case to the Commission to except fluxing stone from any section 13 order which the Commission might enter. After devoting an extensive portion of its report to fluxing stone the Commission rejected appellants' contentions. It concluded that the intrastate rate on fluxing stone in Arkansas is a burden on interstate commerce and thus violated section 13(4). No other interpretation of the Commission's decision is possible. Consequently, the issues raised regarding fluxing stone were considered and passed on by the Commission and it is irrelevant whether the matter could have been decided on another basis. It is a fundamental rule of administrative law that an agency's decision must be upheld, if at all, on the same basis as stated in the decision. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169; *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196.

Thus the Commission has specifically held that the Arkansas intrastate rate on fluxing stone is a burden on interstate commerce even though the Commission itself approved, for the same carrier in the same territory, a lower rate on fluxing stone applicable in inter-

state commerce. The question is whether the Commission exceeded its authority with respect to this part of its decision and whether the District Court erred in failing to set aside and annul the Commission's decision insofar as it was applicable to fluxing stone.

STATEMENT OF THE CASE

While the question presented has far reaching effects, the factual situation can be presented clearly and concisely. Separate commodity classifications are recognized by the railroad carriers and by the Interstate Commerce Commission for "crushed stone" and for "fluxing stone". Since fluxing stone is a basic raw material used in a great many manufacturing processes, fluxing stone rates are always maintained on a lower basis than crushed stone rates. In Arkansas there is a substantial intrastate movement of fluxing stone from Myersville, Arkansas to Bauxite, Arkansas for the aluminum industry. This rate was originally established as a maximum rate by the Arkansas Commerce Commission at $1.16 and subsequently raised by order of the Arkansas Commission to $1.38 which is its present level. There is no other fluxing stone rate for the aluminum industry in the United States.

In the neighboring state of Texas, also in Southwestern Territory, there are a number of intrastate rates on fluxing stone applicable to the Texas iron and steel industry. These rates are generally on a lower basis than the Arkansas fluxing stone rate for the aluminum industry and are participated in by the same railroad involved in the Arkansas movement of fluxing stone for the aluminum industry.

The only interstate rate in this territory on fluxing stone applies to the alkali industry for which the car-

rier is the Missouri Pacific Railroad, the same carrier involved in the Arkansas aluminum fluxing stone movement and one of the appellee railroads in this case. This stone moves from Prairie du Rocher, Illinois to Baton Rouge, Louisiana. The route of movement passes through the entire state of Arkansas and there is no dispute that this interstate rate is on a lower basis than the Arkansas rate.

One of the curious aspects of this case is the confusion which has arisen as to whether the commodities being transported in the Arkansas fluxing stone movement and the Prairie du Rocher movement are the same or are comparable. An illustration of this confusion is found at page 7 of the Government's motion. In footnote 7 the Government states that appellants argued to the Commission that the stone transported in the Prairie du Rocher movement was different from the stone transported for the Arkansas movement, whereas the railroads were contending that the two commodities were the same. The Government then states that the parties switched their positions on this vital factual question. This characterization of the contentions of the parties is entirely incorrect.

Throughout this proceeding, appellants have steadfastly maintained that there should be no distinction between the commodities transported in the Prairie du Rocher case and the Arkansas movement here involved. In both cases the commodity was fluxing stone and so recognized by the parties throughout all phases of the case. Indeed, one of Appellants' principal points is that the higher interstate rate on fluxing stone makes the finding that the Arkansas rate is unduly low completely invalid.

Furthermore, the railroads have never denied that the commodities involved in both movements were fluxing stone. Their principal contention is that the distinction between the Prairie du Rocher movement and the Arkansas movement is the presence of water competition in Prairie du Rocher which is not present in Arkansas. The Commission, however, rejected the validity of this distinction and pointed out that the language used in the two tariff descriptions was different.

Tariffs are designed so that ordinary laymen can determine what rate is applicable. They are written and published by many different persons and different language may be used to define the same product by different publishing agents in different places. In Arkansas the tariff description is—

> "Limestone, run of crusher, to be used only for fluxing purposes in the production of alumina"

In the Prairie du Rocher case the commodity description is—

> "Limestone crushed (not ground) run of crusher ranging in size from ¼ to 10 inches."

The use of the Prairie du Rocher stone was explained in the report of the Commission in *Limestone from Prairie du Rocher, Ill. to Baton Rouge, La.*, 276 I.C.C. 381, 382; 313 I.C.C. 71 as for the Solvay Process Division of Allied Chemical & Dye Corp. at its alkali plant in Baton Rouge. Appellees' rate witness agreed that it was fluxing stone, (R. 893, Tr. 22), and there is no doubt that the products in the compared movements are the same.

It is true that fluxing stone is limestone which has been crushed. It is also true that much of the com-

modity transported as "crushed stone" is also crushed limestone. But the Commission and railroads have recognized a classification difference, for rate making purposes, between fluxing stone and crushed stone, (J.S. 23a-24a), and it is common knowledge that fluxing stone rates are lower than the rates maintained for crushed stone (R. 884).

Thus the essential facts in this case are quite simple. The Commission has approved an interstate rate on fluxing stone which is lower than the level prescribed on fluxing stone in Arkansas by the Arkansas Commerce Commission. The Commission found the interstate rate compensatory. The interstate rate applied to fluxing stone for the alkali industry; the intrastate rate applies to fluxing stone for the aluminum industry. The rates were both multiple car rates; the volume of movement and other characteristics were remarkably similar (R. 597-98). Yet the Commission has held that failure to increase the higher intrastate rate constitutes a violation of section 13(4) on the grounds that it (the higher rate) is unduly low and is a burden on interstate commerce.

ARGUMENT

The statutory authority on which Interstate Commerce Commission must rely in asserting jurisdiction over the intrastate rate on fluxing stone is § 13(4) of the Interstate Commerce Act. (49 U.S.C.A. 13(4)). That section provides that the Commission may prescribe rates to be charged, or classifications or practices to be observed, if there is any undue, unreasonable or unjust discrimination against, or undue burden on, interstate commerce.

The majority of § 13 cases brought before the Interstate Commerce Commission since the Second World War have resulted from refusal of certain states to grant across the board rate increases on intrastate traffic which had previously been authorized on interstate traffic by the Interstate Commerce Commission. They are usually referred to as general revenue cases and involve rates on a great many commodities. Decisions rendered by this Court in *King* v. *United States,* 344 U.S. 254, *Public Service Commission* v. *United States,* 356 U.S. 421, and considered by this Court in *Mississippi Public Service Comm.* v. *United States,* 124 F. Supp. 809 (aff'd, 349 U.S. 908) and in *State Corp. Com. of Kansas* v. *United States,* 216 F. Supp. 376, (aff'd 375 U.S. 15), are all in the category of a general revenue case involving numerous commodities.

However that part of the Commission's decision which is here involved concerns its application to the commodity rate on fluxing stone and appellants challenge the validity of the Commission's order which requires this rate to be increased above the level prescribed by the Arkansas Commerce Commission as a maximum rate. To find an analogous situation it is necessary to study this Court's decision rendered in 1933 in the Florida log case, *Florida* v. *United States,* 292 U.S. 1, 78 L. Ed. 1077, 54 S. Ct. 603 (1933). The issue raised in that case was the validity of the Interstate Commerce Commission's order holding that the Florida intrastate rate on logs was unjustly discriminatory against interstate commerce. A previous decision of this Court had nullified the Commission's order because of insufficient findings (*Florida* v. *United States,* 282 U.S. 212, 74 L. Ed. 302, 51 S. Ct. 119). The Court

found that the Commission, in a new hearing, made the essential findings which were supported by substantial evidence and affirmed the Commission's conclusion that the intrastate rates were unduly burdensome against interstate commerce and thus in violation of § 13(4).

The Court pointed out that the Interstate Commerce Commission, in its decision entitled *Georgia Public Service Comm.* v. *Atlantic Coastline R. Co.*, 186 I.C.C. 157, compared the log rates in Florida with other log rates applicable in Southern Territory, both intrastate and interstate. At pages 160-163, the Commission showed that the Florida intrastate rates on logs prescribed by the Florida Commission were on a lower basis than the interstate rates maintained by the same carrier and lower than other intrastate rates in the same general territory. They found that transportation conditions in Florida were not such as to warrant a lower basis of rates on logs and further found that the transportation conditions in Florida were actually less favorable than on the Atlantic Coastline System (the carrier involved) outside of Florida. This Court (292 U.S. at p. 9) observed that the Commission had found the Florida rate scale was abnormally low in comparison with other interstate and intrastate rates and was less than reasonably compensatory.

Under such evidence presented to this Court in the Florida case, the Commission's order was undoubtedly justified. But the facts in this case are quite different. Here it is not disputed that the only rates on fluxing stone in Southwestern Territory are lower than the Arkansas fluxing stone rate. Furthermore, the Commission itself declared that the lower interstate rate (Prairie du Rocher to Baton Rouge) was compensa-

tory, *Limestone in Train Loads From Prairie du Rocher, Ill. to Baton Rouge, La.,* 313 I.C.C. at p. 86. Thus, the evidence here really indicates that the Arkansas rate is abnormally *high* when compared with other rates maintained on fluxing stone by appellee, Missouri Pacific Railroad. Furthermore, it is well established that one of the essential findings to support an order for revenue discrimination is that the intrastate rate is abnormally low, see *Mississippi Public Service Comm.* v. *United States,* 124 F. Supp. 809 at 813. Indeed, the Commission did make this finding but certainly it cannot be considered as supported by the evidence with respect to fluxing stone. Yet the Commission's finding applies to fluxing stone.

Appellants have established that the Arkansas fluxing stone rate here involved is not abnormally low. They have further shown that it is higher than a rate maintained by the same carrier in interstate commerce in the same territory which rate has been held by the Interstate Commerce Commission to be compensatory. As the Commission itself has recognized in *South Carolina Intrastate Freight Rates & Charges,* 300 I.C.C. 307, 309, there can be no burden on interstate commerce caused by an intrastate rate which is higher than a comparable interstate rate. The Commission sought to avoid the force of its own precedent by referring to the difference in language of the tariff discription. But both commodities are fluxing stone; both are so-called "multiple-car" volume rates, and both apply in the same general territory. If the Prairie du Rocher rate isn't comparable then there is nothing which is comparable. The crushed stone rates in Ar-

kansas are certainly not comparable because they apply to a different and higher-rated classification. The Commission must find the intrastate rate is unduly or abnormally low before it can assert jurisdiction. Since the rate attacked is higher than other fluxing stone rates in the Southwest, it is impossible to conclude that it (the higher rate) is unduly low and a burden on interstate commerce.

It is to be noted that there is no attack on the Arkansas Commission's classification of this stone even though the Interstate Commerce Commission, under section 13, could overturn the fluxing stone classification if it thought such classification was erroneous. The conclusion is thus inescapable—the Commission's decision, as applied to fluxing stone, exceeds its statutory authority and constitutes an unlawful invasion of the Arkansas Commission's authority to establish a maximum reasonable rate.

CONCLUSION

The Commission's decision in this case arose out of a general revenue proceeding involving the application of across-the-board increases in freight rates to intrastate commerce. The Commission however, in addition to determining the issue of revenue discrimination generally, also found revenue discrimination was caused by the level of the Arkansas fluxing stone rate. Since this rate is higher than other fluxing stone rates in the same territory, that part of the Commission's decision relating to fluxing stone is invalid. The District Court erred in not annulling the Commission's

decision relating to fluxing and setting aside the resulting rate increase with respect to that commodity.

Respectfully submitted,

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Dated at Washington, D. C.
this 17th day of May, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ALUMINUM CO. OF AMERICA ET AL. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 1159. Decided June 5, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.